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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 5

HARRY H. WOODRING, SECRETARY OF WAR, AND H. A. A. SMITH, GENERAL PURCHASING OFFICER AND CHIEF OF WASHINGTON OFFICE, PANAMA CANAL,[1] PETITIONERS

v.

USTUS S. WARDELL, RECEIVER, DISTRICT NATIONAL BANK OF WASHINGTON, D. C.[2]

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The judgment of the District Court was entered hout an opinion (R. 23–24). The opinion of the rt of Appeals for the District of Columbia 27–28) is reported in 100 F. (2d) 690.

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ubstituted for George H. Dern and Arthur L. Flint, ctively, defendants in the original action (R. 12).
ubstituted for Norman R. Hamilton, plaintiff in the al action (R. 11).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on October 31, 1938 (R. 28). The petition for a writ of certiorari was filed on January 31, 1939, and granted on March 13, 1939 (R. 31). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Funds of the Canal Zone, principally derived from its postal service, were deposited by the Secretary of War in the District National Bank, under an agreement securing the deposit. After insolvency of the bank the full amount of the deposit with interest was repaid from the proceeds of the security. The receiver brought this suit to recover that part of the deposit which exceeded the dividend paid general creditors. Two questions arise:

1. Is the United States an indispensable party defendant?

2. In the circumstances of this case, was the agreement giving security by the national bank invalid?

STATUTES INVOLVED

The applicable portions of the statutes and regulations involved are set forth in the separately printed Appendix to Nos. 5 and 6.

STATEMENT

This case is before this Court upon the pleadings, consisting of an amended bill of complaint (R. 1–11); an answer (R. 12–22), and a motion to strike certain defenses and for the entry of a decree *pro confesso* against the petitioners (R. 22–23); the judgment of the District Court, granting the motion (R. 23–24); and the judgment of the court below affirming the judgment of the District Court (R. 27–28).

The facts may be summarized as follows:

On August 18, 1914, the then Secretary of War, under whose supervision and direction the Canal Zone territory had been placed, opened two deposit accounts in the District National Bank of Washington, D. C., a national banking association (R. 1–3). One of those accounts was designated "Secretary of War, Canal Zone Funds, Call Account"; the other "Secretary of War, Canal Zone Funds, Checking Account" (R. 23).

These accounts were opened pursuant to a contract entered into between the Secretary of War and the bank (R. 2–3; 8–11). This contract described the Secretary of War as the executive officer of the United States charged with the supervision and control over the governmental affairs of the Canal Zone, and provided as follows (R. 8):

(a) That as security for the safekeeping and prompt payment of the funds and the faithful performance of the contract, the bank would deposit

with the General Purchasing Officer of the Panama Canal bonds "of the acceptable value of a sum not less at any times than the amount of moneys and funds deposited under this agreement," the said bonds to be placed in the vaults of the American Security and Trust Company (R. 10);

(b) That in the event of the bank's failure to pay promptly or keep safely the funds deposited with it, the bonds would become the property of the Secretary of War, who might either retain or sell them, and apply the proceeds to the liquidation of any amount due from the bank, returning any residue to the bank (R. 10);

(c) That the contract would continue until terminated on written notice; or, in the event that Congress should "direct its termination or give instructions concerning the funds covered by this agreement inconsistent with the terms hereof," the bank was to pay over immediately any balance remaining to the credit of the accounts.[3]

The negotiation of the contract was specifically recommended by the Comptroller of the Currency and the Secretary of the Treasury, and the action of the Secretary of War in entering into the contract and in requiring the deposit of collateral security was approved by the Secretary of the Treasury (R. 15).

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[3] Other portions of the contract dealt with the classification of the accounts, payment of interest, and other details of administration of the accounts (R. 9–11).

On March 5, 1933, the bank was closed by Proclamation of the President of the United States; it never reopened, having been found and determined to be insolvent by the Comptroller of the Currency, who appointed a conservator on March 14, 1933. On November 6, 1933, a receiver, predecessor of the respondent, was appointed (R. 2, 13). At the time of the closing of the bank the credit balance in the "Call Account" amounted to $200,000 and the credit balance in the "Checking Account" amounted to the sum of $14,739.80 (R. 2, 3, 13). These sums were composed almost entirely of moneys received by the Postal Service of the Canal Zone, and consisted of deposit money-order funds and money-order funds (R. 14). The par value of the collateral deposited to secure the deposits was at that time $274,200 (R. 11).

On September 24, 1933, the securities were sold to the Hamilton National Bank, under an agreement and arrangement by the Secretary of War and the General Purchasing Officer with the then conservator of the bank (R. 3, 13). The Comptroller of the Currency was aware of the proposed sale and sanctioned and approved it (R. 15–16). From the proceeds of the sale the Secretary of War was paid $214,739.80, constituting the combined balance of the two accounts, together with $3,535.37, representing accrued interest to the date of the sale; this was accomplished by opening a new deposit account in the Hamilton National Bank in the name

of the Secretary of War, Canal Zone Funds (R. 3).

On June 4, 1936, the receiver of the District National Bank brought suit against the petitioners herein to recover that part of the proceeds which represented an amount in excess of the distributive dividends paid to general creditors.[4] In the complaint, in addition to the general facts contained in the foregoing statement, the receiver asserted, in substance, that the various defendants were being sued both in their official and individual capacities; that the pledge of securities by the bank and the acceptance and sale thereof by the Secretary of War were without authority of law; and that the proceeds of the sale became a trust fund for the benefit of the depositors, creditors, and stockholders of the bank (R. 1–3). The prayers for relief sought to compel the petitioners "as Secretary of War and General Purchasing Officer and Chief of Washington Office, The Panama Canal, respectively," to account for the funds (R. 6).

The petitioners in their answer averred that they were parties in their official capacities only, by substitution for their predecessors in office, and that the United States was an indispensable party defendant (R. 16). Reviewing the statutes and regulations relating to the Canal Zone (discussed in the

[4] The complaint also sought the recovery of the proceeds of the sale of collateral securities for the deposit of funds of the Government of the Philippine Islands by the Secretary of War (R. 4–7). The judgment below did not deal with this phase of the case, and it is not now before this Court.

Argument, *infra*), petitioners asserted that the making of the contract for the deposit and delivery of securities was within the lawful authority of the Secretary of War (R. 13). Petitioners further alleged that the action of the Secretary of War in taking security to safeguard deposits was specifically approved by the Secretary of the Treasury, that it was in accordance with a practice and custom of twenty years' standing, approved and sanctioned by the Secretary of the Treasury and by the Comptroller of the Currency, and acquiesced in by Congress, and that the sale of securities was approved by the Comptroller of the Currency (R. 15–16, 20).

The respondent's motion to strike certain parts of the answer and for the entry of a decree *pro confesso* was granted, and judgment was entered against the petitioners (R. 22–24). On appeal, the Court of Appeals for the District of Columbia affirmed the judgment (R. 28).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that a national bank could not lawfully pledge its assets to secure a deposit account which was made up of moneys received from deposit money order accounts and postal money order accounts of the Panama Canal.

2. In holding that the Secretary of War had no authority to require the deposit of assets as such security.

3. In failing to hold that the laws applicable to postal money order accounts in the United States were also applicable to the postal accounts of the Canal Zone.

4. In failing to hold that the moneys in question were public moneys of the United States.

5. In failing to hold that the United States is an indispensable party to this suit.

6. In affirming the judgment against the petitioners.

SUMMARY OF ARGUMENT

I

The District National Bank made a valid pledge when it transferred assets as security to safeguard the deposit made by petitioners' statutory predecessors as the executive officers charged with supervision of the affairs of the Canal Zone Government.

1. The validity of the pledge follows from the general governmental character of the deposit. This contention is elaborated in Brief for the Petitioners in *Inland Waterways Corp. et al.* v. *Hardee*, No. 6, this Term.

2. In any event the validity of the security is established by Congressional approval of the taking of the security. In 1910 the Secretary of War, charged with supervision over the governmental affairs of the Canal Zone, and faced with the problem of the safekeeping of the moneys of the Canal Zone, primarily money-order funds, entered into a

contract of deposit with the Commercial National Bank under which security was given to safeguard the deposit. In 1914 a similar agreement was concluded with the District National Bank. On April 1, 1914, upon the reorganization of the local government of the Canal Zone, the Governor of the Canal Zone promulgated regulations requiring that "Canal Zone money-order" funds and other funds be deposited by the Treasurer of the Canal Zone "in depositories under the contracts entered into by the Secretary of War." Governor's Circular No. 660–2. Pursuant to this regulation, retained substantially without amendment, moneys, consisting primarily of Canal Zone money-order funds and deposit money-order funds, were on deposit in the District Bank when it became insolvent in 1933.

The securing of the Canal Zone deposits was initiated upon the advice and with the assistance of the Secretary of the Treasury, and continued with the knowledge and approval of Comptrollers of the Currency. The officials governing the Canal Zone were following a plain governmental interest in obtaining a safe depository for its funds. And, obviously, this interest did not conflict with any policy of Congress which has not expressly prohibited pledges by a national bank, and has required security for other public funds.

3. The taking of security was early and frequently reported to Congress—in reports of the Isthmian Canal Commission, and later in reports

of the Governor of the Panama Canal; in a communication from the Secretary of War to the House of Representatives. Congress acquiesced in the practice and no disapproval was ever expressed. In these circumstances, the taking of security received the implied approval of Congress.

4. The validity of the taking of security is firmly established by the affirmative confirmation and approval of Congressional enactment. By the Act of August 21, 1916, Congress provided for the payment of interest on Canal Zone deposit money-orders, and further provided that such interest might be paid out of the "interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations." The statute plainly referred to the regulations of the Governor, the only regulations under which money-order funds were deposited, and constitutes Congressional approval of the provision in the regulations requiring deposit under the contracts entered into by the Secretary of War, and accordingly of the taking of security. Thus, even if the acts of the officials in obtaining security were unauthorized when taken they were validated by this Congressional enactment.

Finally, the validity of the deposit, at least as to the deposit money-order funds, is independently shown by reference to the Act of February 16, 1933, which prescribes that the postal service of the Canal Zone shall be governed by such of the laws

and rules of the United States postal service as are not inapplicable to Canal Zone conditions. In view of the 1910 statute authorizing the taking of security for deposits of postal savings funds, the 1933 Act validated the security given to safeguard the deposit money funds, the Canal Zone counterpart of postal savings and recognized by Congress as issued in lieu thereof (Section 6 of the Act of August 21, 1916).

II

A. The suit must be dismissed as one brought against the United States without its consent, the Canal Zone being in effect merely one aspect of the Government of the United States.

B. Though the suit was nominally brought against the officers of the United States, the United States is nevertheless the only party against which in fact the relief was asked and against which the judgment or decree effectively operates.

1. This suit, alleging the invalidity of the pledge of bonds made in 1914 to secure the "Secretary of War, Canal Zone Funds" deposit, is an attempt to impress a constructive trust upon the proceeds of the bonds, a "Secretary of War, Canal Zone Funds" deposit in another bank.

2. The Canal Zone, the pledgee of the bonds, is an indispensable party defendant in this suit to recover the assets pledged or the proceeds thereof. The suit will effectively adjudicate the interests of

the United States, reducing its resources if successful. Petitioners have no personal interest in the case, and the United States is the only real party in interest in respondent's pursuit of property held for the United States for use for governmental purposes.

The doctrine of sovereign immunity is not inapplicable because respondent alleged that the pledge was invalid, and that therefore the property belongs to the Bank. This Court has rejected the conclusion that plaintiff by phrasing his complaint so as to deny title in the United States may preclude the United States from invoking its sovereign immunity. The very question whether the pledge was valid, and whether the proceeds would be returned to the Bank, is one on which the United States is "entitled to be heard," and which must be heard by Congress or such tribunal as it may designate.

Cases such as *United States* v. *Lee*, 106 U. S. 196, entertaining an action of ejectment against officers of the United States as individuals are distinguishable. Such a judgment would not be binding upon the United States; indeed, this inconclusiveness is inherent in the purely possessory common-law action of ejectment. Where the action is appropriate for the effective adjudication of property interests, and the complaint rests upon an underlying claim of right which is opposed by the United States as the real party in interest, the action will

be dismissed in the absence of the United States. Accordingly, this Court is without jurisdiction to consider respondent's assertion of a right to the proceeds of the bonds.

In any event respondent must concede that the United States has some interest in the proceeds of the bonds. Even if the pledge was *ultra vires* the bank, the transaction was voluntary and hence, as was intended by the parties, an interest passed to the pledgee. If the pledge was *ultra vires* the interest passed subject to an implied promise to return the property, but the suit to set aside the *ultra vires* transaction does so by terminating the interest illegally transferred. Indeed, this suit is one to impress a constructive trust and constitutes recognition that there is a legal interest outstanding which plaintiff seeks to have impounded for his benefit. Respondent in essence prays that a trust be impressed upon the "Secretary of War, Canal Zone Funds" account, in which the Canal Zone indisputably has a legal interest.

The foregoing discussion has proceeded upon the assumption that the Canal Zone funds deposited in the bank now being liquidated by respondent constituted money or property of the United States. This proposition was asserted by petitioners in their answer, and seems clearly correct. The money-order funds collected by the Canal Zone, which is merely one aspect of the United States, gave rise to a debtor-creditor relationship, the

moneys received becoming funds of the Canal Zone. Congress, moreover, has plenary control over the funds.

3. Apart from its pecuniary interest, the United States is an indispensable party defendant because its governmental interests have obligated it to make payment to the holders of the money orders and deposit money orders. A decree for respondent would effectively deprive the United States of the means of discharging this obligation, an obligation which would have been legally enforceable against a nonsovereign.

C. The want of jurisdiction of the present suit is equally clear from the consideration that the suit is maintained against petitioners not in their individual capacity but in their official capacity.

1. The decisions of this Court plainly hold that in the absence of Congressional consent a suit may be maintained against government officers only in their individual capacity, and not in their official capacity.

2. The basis and object of the present suit show that it is maintained against petitioners in their official capacity.

The suit in substance prays that the Court compel petitioners to withdraw funds from the "Secretary of War, Canal Zone Funds" bank account, a judicial mandate controlling their exercise of their powers as officials of the Canal Zone. Moreover, the mandate would require such exercise of

power in a manner not prescribed or authorized by statute, Congress having already appropriated the money-order funds to different purposes.

This Court has entertained actions, in ejectment, detinue, or replevin, based upon the possession of the defendant officers. Though defendant may be in possession as an officer of the United States, inevitably he also has *personal possession* of the property and he can be called upon, as an individual, to account for this personal, physical possession. A suit to impress a constructive trust, however, is based upon unjust enrichment. Plainly petitioners have *not* received *personal enrichment* by the possession of the proceeds of the bonds. The proceeds, whether Canal Zone bank account or other bonds, will either be used in the course of official duties or transferred to the successors in office. This action, asserting an equitable claim against an officer in possession of property, is brought against him in his official capacity. See *Governor of Georgia* v. *Madrazo,* 1 Pet. 110.

Moreover, even actions based upon the officer's possession must admit of an allegation that the possession is personal, and not official. This Court has countenanced actions to recover securities while yet in the possession of the seizing officer, or unlawfully taken by him, on the ground that such actions are defensive in character. The action is equivalent to a suit to enjoin the taking, the court stepping in before the taker has turned the prop-

erty over to his government and while it is possible to think of him as an individual trespasser. However, when the property has been turned over to another official, or a successor, it is undeniable that the latter's possession occurs only by virtue of his official capacity. In the present case, both petitioners are the successors in office of those who were in office when the bank conservator yielded the bank's assets; their possession of the proceeds of the bonds is purely an official possession.

3. The cases justifying the maintenance of suits brought against defendant officials in their individual capacity have been primarily concerned with unconstitutional legislation. In such cases the State or United States is deemed not involved because of a view that it may not be admitted that the State or the United States may violate the Constitution. In other cases, the Court has proceeded against officials acting in excess of their authority, and unlawfully assuming to exercise the power of government. These cases have permitted this Court to protect the citizens against arbitrary and unilateral action in the name of the Government.

In the present case, however, there is no unconstitutional legislation, no excess of authority so far as petitioners are concerned, no malice or conspiracy, no unilateral violation of plaintiff's rights. The bank engaged in a voluntary commercial transaction with an executive official, as to a matter the illegality of which was never conceived, and which

even now is at least doubtful. There exist none of the coercive elements which, under our theory of government, suggest that the suit is one against the officer as an individual. The bank has been dealing with certain persons as officials of the United States, and the receiver is now attempting to litigate a doubtful question arising out of that voluntary and long-continued commercial transaction. The real interest of the United States in this suit should be recognized by this Court.

ARGUMENT

Petitioners advance two grounds for reversing the judgment below: that the United States is an indispensable party defendant; and that the contract securing the Canal Zone deposits was valid. The former contention is jurisdictional, but will be presented last because appreciation of the argument is facilitated, to some extent, by acquaintance with the character of the Canal Zone deposit, an essential ingredient of the argument as to the validity of the security.[5] Again for the sake of clarity,

[5] While the pleadings are not as specific as might be desired, stating merely that the deposits were "almost entirely composed of" money order funds, the fact is that the small proportion of the deposits which represent other funds are equally covered by the argument made in Point I of this brief (except for the second congressional ratification developed at pp. 42–45, *infra*). However, if decisions for the Government were placed on Point I, directions for a new trial would seem necessary; if placed on Point II, a direction of dismissal would be appropriate.

in so far as the legality of the pledge is bottomed upon relatively general considerations with respect to federal deposits, the contentions will be developed in the petitioners' brief in No. 6. This brief will present the arguments peculiar to the Canal Zone.

I

The Pledge Is Valid

A. THE POWER OF RESPONDENT BANKS TO SECURE THE DEPOSITS IS ESTABLISHED BY CANAL ZONE REGULATIONS AND PRACTICES APPROVED AND RATIFIED BY CONGRESS

Authority for a national bank to give security for a deposit will be implied from any provision of law requiring or authorizing a government officer or agency to obtain security for the deposit. *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, 257, 258, and notes 11 and 12. Such provision may be found not only in federal legislation specifically providing for the security but also in Congressional approval and ratification of territorial legislation or regulations. *Berger* v. *Chase National Bank* (C. C. A. 2d), decided July 24, 1939. Canal Zone practices and regulations, and Congressional approval thereof, demonstrate the validity of the pledges given to secure the deposits involved in this case, which are composed almost entirely of moneys received by the postal service of the Canal Zone from the sale of money orders and deposit money orders (R. 14; No. 6, R. 84).

1. *The Orders, Regulations, and Practices Pursuant to Which the Canal Zone Funds Were Deposited and Security Was Taken*

(*a*) *Government of the Canal Zone*

For the sake of clarity and orderly discussion, we shall first review the statutes delegating the powers of government over the Canal Zone. The development of the government of the Canal Zone was surveyed by this Court in *McConaughey* v. *Morrow*, 263 U. S. 39. The Spooner Act of June 28, 1902, c. 1302, 32 Stat. 481, directed the President to build the canal, and created an Isthmian Canal Commission through whom the President was to do the work. The Act of April 28, 1904, c. 1758, 33 Stat. 429, authorized the President to take possession of the ten-mile "Canal Zone" with respect to which the rights of sovereignty had been granted by the Republic of Panama in the treaty of November 18, 1903 (33 Stat. 2234). Section 2 of this Act, Appendix, p. 5, provided that all military, civil, and judicial powers and the power to make all rules and regulations necessary for the government of the Canal Zone should be vested in such persons as the President should direct.

President Roosevelt, by letter of May 9, 1904, to Secretary of War Taft,[6] Appendix, pp. 43–46, au-

[6] The entire letter is set forth at pp. 20–26 of the volume "Executive Orders Relating to The Panama Canal (March 8, 1904, to December 31, 1921)," Annotated, 1921 (Panama Canal Press, 1922).

thorized the Isthmian Canal Commission to make all regulations for the government of the Zone and to legislate on all rightful subjects of legislation, and directed that this governmental power should be "exercised under your supervision and direction as the Secretary of War." A government was organized, a Governor of the Canal was appointed, and complete rules and regulations having the force of law were duly adopted. The Act of April 28, 1904, was expressly limited in duration to the expiration of the Fifty-eighth Congress, which occurred on March 4, 1905. However, the continued existence of the Government of the Canal Zone was recognized in appropriation acts. See *McConaughey* v. *Morrow, supra.* The Attorney General, in an opinion dated January 30, 1907, advised the Secretary of War that the 1904 law was merely declaratory of the President's duty under the treaty and the Spooner Act, to discharge the obligation of the United States to provide an orderly government for the Territory under its control; he concluded that the President may now, directly or through appointees and employees, "adopt needed rules and regulations for the government of the Canal Zone." 26 Ops. A. G. 113, 119. To resolve further doubts, Section 2 of the Panama Canal Act of August 24, 1912, c. 390, 37 Stat. 560, Appendix, p. 6, ratified and confirmed all laws, orders, regulations, and ordinances adopted in the Canal Zone by order of the President for the government of the Canal Zone.

Section 4 of this 1912 Act authorized the President to discontinue the Isthmian Canal Commission and thereafter to complete and operate the Panama Canal and govern the Canal Zone through a governor of the Panama Canal (48 U. S. C., sec. 1305). Section 7 provided that the Governor of the Panama Canal should perform all duties in connection with the civil government of the Canal Zone and that unless otherwise provided in the act "all existing laws of the Canal Zone referring to the civil governor or the civil administration" thereof should be "applicable to the Governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law" (48 U. S. C., sec. 1307). By Executive Order of January 27, 1914, effective April 1, 1914,[7] the President abolished the Isthmian Canal Commission and established a permanent departmental organization under the direction of the Governor, subject to the supervision of the Secretary of War.

(b) Canal Zone postal service

The Canal Zone postal service was established pursuant to an order of the Secretary of War dated June 24, 1904,[8] which provided for specified money-order offices. Act No. 8 of the Isthmian Canal Commission, dated September 2, 1904, Ap-

[7] See Appendix, p. 22. The entire order is set forth in opus cited *supra*, note 1, p. 155.

[8] See opus cited *supra*, note 1, p. 26.

pendix, p. 16, provided, *inter alia,* for the postal service and prescribed that it should be conducted according to the laws and regulations governing the postal service of the United States, so far as applicable.[9] A money-order system was established and approved by a resolution of the Commission of May 2, 1906 (see Appendix, pp. 19–20).

After the creation in 1910 of the United States postal savings system, the President, by Executive Order of September 8, 1911, established a postal savings system for the Canal Zone.[10] Because of inapplicability to local conditions, this order was repealed by Executive Order of September 5, 1914, which, instead, instituted what are now known as deposit money orders, by providing that—

> for the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.[11]

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[9] The complete Act is set forth at pp. 61, 75–76 of Laws of the Canal Zone, Isthmus of Panama, enacted by the Isthmian Canal Commission, August 16, 1904, to March 31, 1914 (Panama Canal Press, 1922).

[10] This is set forth in the Appendix, p. 20–21. This order created a board of trustees to supervise the postal savings depository offices and provided that the postal savings funds received should be deposited with the Treasurer of the Canal Zone. The system was operated without payment of interest.

[11] These deposit money orders were used not to transmit moneys but for purposes of saving, and after a period they drew interest, see Appendix, p. 8. Difficulty had been found

(c) *Canal Zone financial practices*

The Congressional appropriation Acts, from 1908 to 1914, appropriated the revenues derived from the Canal Zone postal service to the maintenance of that service, and appropriated the other funds collected by the Canal Zone Government substantially to the general Canal Zone governmental needs.[12]

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in the administration of the postal savings system whereunder postal savings deposits were evidenced by certificates issued in certain denominations, "each bearing the name of the depositor, the number of his account, the date of issue, and the name of the depository office" (Sec. 5 of Executive Order of September 8, 1911, Appendix, p. 21). The thrifty subsequently arranged their affairs, as they had previously, by buying deposit money orders to be cashed, if they so desired, at a later date.

[12] See Section 3 of the Sundry Civil Appropriation Act of May 27, 1908, c. 200, 35 Stat. 386, Appendix, pp. 5–6. A similar provision was contained in the subsequent Acts to and including the 1914 Act: e. g., Act of March 4, 1909, c. 299, 35 Stat. 945, 1026; Act of August 1, 1914, c. 223, 38 Stat. 674.

The Order of the Secretary of War, promulgated November 5, 1905 (Appendix, p. 17), had provided that money-order funds be deposited with the Treasurer of the Zone as postal receipts, but to the credit of the Director of Posts as money-order funds.

The legislative history of Section 3 of the Act of May 27, 1908, is as follows: The President's letter of May 9, 1904, Appendix, pp. 43–46, authorized the Isthmian Canal Commission, to subject to the Secretary of War, to exercise general legislative power, including the power to raise and appropriate revenue, and directed that governmental expenses be defrayed from local revenue so far as sufficient. The Comptroller of the Treasury held that these local revenues did not have to be covered into the Treasury, on the ground that the

By regulations effective October 1, 1908, issued by the Commission September 17, 1908, and approved by the Secretary of War October 31, 1908, there was established as a separate institution the Treasury of the Canal Zone, and local revenues were thereafter paid into this Treasury.[13] The appointment of a Treasurer raised the question of safekeeping of the moneys of the Canal Zone, which consisted primarily of money-order funds. The suggestion that some $700,000, which would remain in the nature of a permanent fund as cash in the Treasury of the Canal Zone, be deposited in a bank,[14] approved by the Chairman of the Commission[15] and supplemented by a specific recommendation of the Commercial National Bank of Washington, D. C., as the depository for Canal

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Canal Zone was not a territory "incorporated" into the United States, and was not covered by general Federal statutes but by such rules as the President might authorize. 11 C. D. 36. At hearings held on February 9, 1907, the House Committee on Appropriations expressed doubt as to the authority of the Isthmian Canal Commission to appropriate the local revenues and not cover them into the Treasury. House Hearings on Sundry Civil Appropriation Bill for 1908, pp. 892–894. Congress clarified the situation by expressly enacting what in substance had been the administrative practice.

[13] See "Canal Record" of October 14, 1908, p. 51.

[14] See Letter, Mr. Warwick to Lt. Col. Goethals, September 19, 1908, Appendix, pp. 46–51.

[15] See Letter, October 21, 1908, Chairman Goethals to Secretary Wright, Appendix, pp. 51–53.

Zone funds, was approved by Secretary Wright.[16] As petitioners alleged (R. 15; No. 6, R. 85), this action was the subject of correspondence with the Treasury Department. The Treasury Department stated what would constitute satisfactory security, and appropriate terms for the contract of deposit. The Secretary of the Treasury specifically advised the Secretary of War that a deposit in the Commercial National Bank would be safe and satisfactory if secured by certain bonds.[17] Thereafter, on May 11, 1910, the Secretary of War entered into a contract with the Commercial National Bank for the deposit of Canal Zone funds (R. 17–21, No. 6). On August 18, 1914, again in accordance with the advice of the Secretary of the Treasury,[18] the Secretary of War entered into a contract with the District National Bank (R. 8–11).

Both contracts of deposit state that the agreement is between the Bank and "the Secretary of War, the executive officer of the United States charged by the President with supervision and con-

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[16] See Letter, October 24, 1908, Chairman Goethals to Secretary Wright, Appendix, pp. 52–53, endorsed as approved by the Secretary.

[17] Letter, Secretary of Treasury MacVeagh to Secretary of War Dickinson, April 25, 1910, reprinted, Appendix, p. 57; Letter, Acting Secretary of Treasury Hilles to Capt. Boggs, April 21, 1910, reprinted, Appendix, pp. 55–56.

[18] Letter, Secretary of Treasury McAdoo to Secretary of War Garrison, July 28, 1914, reprinted, Appendix, pp. 57–58.

trol over the governmental affairs of the Canal Zone." Both contracts recite that the Secretary of War desires to secure a safe place for the deposit, custody, and disbursement of various administrative funds, deposits, postal funds, etc.; and also an expeditious method of examining and transferring the moneys (R. 8, No. 5; R. 18, No. 6). Both contracts provide for the deposit of bonds, which were of the same classes as those required by the Secretary of the Treasury, as "security for the safekeeping and prompt payment of the moneys and funds deposited under this agreement" (R. 10, No. 5; R. 19, No. 6).

These contracts of deposit, with their provisions for security, continued to be a datum in the Canal Zone's fiscal arrangements after the reorganization of the Canal Zone government. The President's Executive Order of January 27, 1914, effective April 1, 1914 [promulgated pursuant to Section 7 of the 1912 Act (see discussion, *supra,* pp. 20–21)], provided, *inter alia,* that the new government should consist of certain departments, including an Accounting Department under the direction of the Governor of the Panama Canal, subject to the supervision of the Secretary of War; and that the duties of the officers of this Department should be prescribed in regulations issued by the Governor, with the approval of the President.

The Governor, continuing the existing arrangement, as was obviously contemplated by Section 7

of the 1912 Act (*supra,* p. 21), issued regulations prescribing the deposit of the Canal Zone postal funds under the contracts entered into by the Secretary of War. Governor's Circular No. 660–2 of April 1, 1914, reprinted Appendix, pp. 25–27.[19] His regulations provided in part that the Collector should perform the duties theretofore performed by the Treasurer of the Canal Zone, and continued:

> For the funds of The Panama Canal, he shall take the Paymaster's receipts; *for Canal Zone, money order,* postal savings bank, clubhouse, and other trust *funds* and security deposits, *he* shall take the draft of the Paymaster on the Treasurer of the United States and *shall deposit same in depositories under the contracts entered into by the Secretary of War.* * * * [Italics added.]

Respondent suggests that this regulation applies to "money order" funds, but not to the "deposit money order" funds which replaced the postal sav-

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[19] 660 Series of Governor's Circulars relates to organization. See p. 157, n. 395 of Executive Orders relating to the Panama Canal, opus cited, *supra,* note 1. The Governor promulgates his regulations by circular.

It does not affirmatively appear that this regulation was approved by the President. Such approval may legitimately be inferred from the promulgation of the set of regulations upon the first day of the Governor's authority under the Executive Order of January 27, 1914. In any event the regulations were validated by Congress in the Act of August 21, 1916, see *infra,* note 25.

ings system. The "deposit money orders" are clearly covered by the regulation, since they are literally "money orders," being "money orders * * * issued in the Canal Zone payable to the purchaser at the office of issue" (Executive Order of September 5, 1914, Appendix, p. 24).[20] The regulation has always been applied to deposit money order funds, an interpretation approved in any event by the retention of substantially the same language in Governor's Circular No. 660–61 of April 5, 1923.[21]

2. Approval by Long Continued Practice and Congressional Acquiescence

We submit that the practice, contracts, and regulations just outlined, now of long standing, constitute a usage which has received Congressional approval and ratification.

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[20] Even under the original money-order system, prior to any institution of postal savings, many employees in the Isthmus purchased money orders payable to themselves at the place of issue and held them for many months. Letter of W. W. Warwick, to Lt. Col. Goethals, dated September 19, 1908, Appendix, p. 46–51.

See also Annual Report of the Governor of the Panama Canal for 1917, reciting statistics on "money orders" and including deposit money orders (p. 258).

[21] "Postal savings, money order, clubhouse, and other trust and security funds received shall be remitted to depositories in accordance with contracts entered into by the Secretary of War, and disbursed only on vouchers or warrants approved by the Auditor."

The taking of the security was indisputably appropriate to the proper conduct of the Canal Zone's finances. Under the 1904 Act, under principles of international law and under the 1912 Act, the President and his nominees had been granted powers of government over the Canal Zone in the broadest terms. The plain governmental power to raise, hold, and disburse revenues carried with it an equally plain governmental interest in the securing of the revenues and funds of the Canal Zone. As the Circuit Court of Appeals for the Second Circuit, in *Berger* v. *Chase National Bank, supra,* said, of the exaction by the Philippine Government of security for its deposits (in respondent banks among others):

> Now there can be little doubt that selection of a safe depositary for its funds is a necessary power to a government. That the power of designation should be extended to banks outside the Islands was natural and fitting, in view of the close relations between the Islands and the mainland and the large business transactions requiring the difficult and expensive task of continual intertransfer of funds between them unless national depositaries were chosen. Indeed, the beneficial nature of the arrangement to all concerned—the banks, the Philippine Government, and the Bureau of Insular Affairs in adjusting and making smooth the course of a civil government in the Islands—was undoubtedly a reason not only for the original

grant, but for the fact that it was not questioned until the present suits.

Moreover, as stated in the *Berger* case, there is no conflict between this governmental interest and any legislative policy of Congress. Congress has always been astute not to place national banks upon a competitive disadvantage with state banks, and it did not specifically prohibit pledges in a national bank. *McNair* v. *Knott,* 302 U. S. 369, 371. Indeed, Congress has even required security to protect the deposits of other public funds. *Texas & Pacific Ry. Co.* v. *Pottorff, supra,* at 257. In reference to Congressional policy, it is particularly significant that the present case involves money-order funds,[22] and, primarily, deposit money-order funds, the lineal descendant of Canal Zone postal savings funds, and therefore referable to the statutes authorizing security for United States deposits of postal savings funds.[23]

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[22] Continental money order funds are governed by R. S. § 4045, 39 U. S. C. § 736, which provides that all money received for the sale of money orders, money transferred from the postal revenues to the money order funds, etc., shall be deemed money order funds and money in the Treasury of the United States, and that it shall be the duty of the Treasurer, etc., to open, at the request of the Postmaster General, an account of "money-order funds" deposited by postmasters to the credit of the Postmaster General and of drafts drawn by him and countersigned by a post office comptroller. See also R. S. § 4042, 39 U. S. C. § 733; R. S. § 4043, 39 U. S. C. § 734.

[23] Act of June 25, 1910, 36 Stat. 814, as amended (39 U. S. C. secs. 759, 766). See discussion, *infra,* pp. 40–43.

The requirement of security for the Canal Zone deposits was initiated with the assistance of the Secretary of the Treasury (see *supra,* p. 23) and was continued for more than twenty years with the knowledge and approval of the Comptrollers of the Currency and of the Secretaries of the Treasury (R. 15). Congress was given specific notice of this security. It was informed by the Annual Report of the Governor of the Panama Canal for 1915 (pp. 278, 279):

> The depositaries of Canal Zone funds, including in that term money order, postal savings, and clubhouse funds, have been continued three in number, the District National Bank and the Commercial National Bank, of Washington, D. C., and the Panama Branch of the International Banking Corporation. On June 30, 1913, the amount on deposit was $2,168,339.62; on June 30, 1914, $1,594,285.53; and on June 30, 1915, $770,-965.18. There is also a small amount still remaining in the Riggs National Bank of Washington, necessarily left there on account of outstanding checks chargeable against the deposit. These funds are all secured by the deposit of high-grade bonds under the control of a representative of the Government. Interest on deposits during the year amounted to $48,798.35, as against $61,354.12 received during 1914.[24]

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[24] This language appears in the Auditor's report to the Governor, which was printed as an appendix to the annual

Several other reports and advices informed Congress of the existence of this security. See Annual Report of the Isthmian Canal Commission for 1913, p. 415, Appendix, pp. 35–36; Annual Report of the Isthmian Canal Commission and The Panama Canal for 1914, p. 328, Appendix, p. 36; Annual Report of the Governor of the Panama Canal for 1916, Appendix, p. 37; Letter, Secretary of War Baker to Speaker of House of Representatives, dated September 12, 1919, set forth in H. Rep. No. 1083, 67th Cong., 2d Sess., p. 16, Appendix, pp. 38–42.

These facts suffice to establish the validity of the taking of security. The practice was long-continued, in existence for over twenty years. It was in furtherance of the governmental interests of the Canal Zone, and did not fly in the teeth of any Congressional prohibition or prohibitory policy. It was countenanced and supported by the Treasury Department. It was early and insistently reported to Congress. The Congress acquiesced in the practice; at no time was any disapproval expressed.

In these circumstances, it seems plain that the taking of security received the implied approval of Congress. The case is one for the application of *United States* v. *Midwest Oil Co.*, 236

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report of the Governor to the Secretary of War and referred to and incorporated therein. This report was submitted in the usual manner by the President to the Congress for its information and was printed as House Document No. 23, 64th Cong., 1st Sess.

U. S. 459. In that case the Court upheld the power of the President to withdraw public lands reported to contain valuable petroleum deposits, although there was no statutory authority for it. The Court said (pp. 469, 472, 473):

> We need not consider whether, as an original question, the President could have withdrawn from private acquisition what Congress had made free and open to occupation and purchase. The case can be determined on other grounds and in the light of the legal consequences flowing from a long continued practice to make orders like the one here involved. For the President's proclamation of September 27, 1909, is by no means the first instance in which the Executive, by a special order, has withdrawn land which Congress, by general statute, had thrown open to acquisition by citizens. And while it is not known when the first of these orders was made, it is certain that "the practice dates from an early period in the history of the government."
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> It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular prac-

> tice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation.

Compare *United States* v. *Macdaniel,* 7 Pet. 1, 14, 15.

3. Ratification by Congress

In the present case, however, the question is even clearer than in the *Midwest Oil* case, for the practice was not only acquiesced in by Congress but was affirmatively confirmed and approved by Congressional statute.

Sections 6 and 7 of the Act of August 21, 1916, c. 371, 39 Stat. 528, provide:

> SEC. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.
>
> SEC. 7. That the interest received from the *Canal Zone money-order funds deposited in banks under Canal Zone regulations* shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to

> the Canal Zone postal service. [Italics supplied.]

This statute constituted clear recognition and ratification of Governor's Circular No. 660–2, *supra,* p. 27. Approval of the regulations carries with it approval of the provisions of the regulations, and accordingly approval of the contracts entered into by the Secretary of War, including their security provisions. See *Mason Co.* v. *Tax Commission,* 302 U. S. 186, where ratification and validation of "all contracts" executed in connection with the Grand Coulee Dam (p. 196) was held to validate terms of the construction contracts contemplating the exercise of local jurisdiction by state officers (p. 208).

The court below adverted to the fact that the pledge was not authorized by any regulation promulgated by the President (R. 117, No. 6). It seems patent that the Act validates the regulations of the Governor. The Act clearly refers to funds already deposited, with interest—the deposits made known to it by the Reports cited above (pp. 31–32); and likewise the Act clearly refers to the funds deposited under regulations in existence. It states what use shall be made of "*the* interest received from *the* Canal Zone money-order *funds deposited* in banks *under Canal Zone regulations.*" The only regulation under which Canal Zone moneys were deposited in banks was the regulation of the Governor of April 1, 1914, and that regulation specifi-

cally commanded the collector to deposit these funds "under *the* contracts entered into by the Secretary of War." [Italics added throughout.]

That this was the purpose of Congress is clearly indicated by the Report of the Governor of the Panama Canal for 1916, p. 485, where reference is made to the deficit of the Canal Zone postal system—

> As previously stated in this report, a large part of the deficit of the Canal Zone postal system would be wiped out if the postal division were allowed interest received from Canal Zone money-order funds *deposited in banks under Canal Zone regulations.* In the past these earnings have been deposited with the United States Treasurer. If this interest were credited to the postal division, it would also permit the payment of interest upon deposit money orders. The following sections were therefore made a part of a bill which passed the House of Representatives on June 17, 1916 (H. R. 15955) * * *. [Italics added.]

The reference was to sections 7 and 8 of H. R. 15955, which were enacted as sections 6 and 7 of the above Act of August 21, 1916. This report makes it clear that the regulations referred to were the Governor's regulations under which the moneys were already deposited. It may be noted that, when the Senate considered the bill, it was substantially disposed of on the basis of the statement of the mem-

ber in charge that the bill represented legislation recommended by General Goethals and approved by the War Department (53 Cong. Rec. 11742).

The Canal Zone practices and regulations, as we have noted above, were in furtherance of the governmental interests. And even if invalid when promulgated, because Congress had not authorized the taking of security from national banks, they were ratified or validated by the 1916 Act.[25] A Congressional statute proceeding upon the basis of the validity of an existing practice or regulation will validate such practice even though Congress has not specifically purported to impart validity. See *Mattingly* v. *District of Columbia*, 97 U. S. 687, 690; *Tiaco* v. *Forbes*, 228 U. S. 549, 556. In the recent decision of *Swayne & Hoyt, Ltd.* v. *United States*, 300 U. S. 297, an Executive Order transferring the powers conferred upon the United States Shipping Board to the Secretary of Commerce was held confirmed and approved by Acts making appropriations to the Department of Commerce for expenses incurred in discharging those functions, and by a later statute transferring the functions from the Department of Commerce to another agency. This Court said (pp. 301–302):

> It is well settled that Congress may, by enactment not otherwise inappropriate,

[25] Similarly the regulation was given Congressional validation, even if originally it was defective because issued without the approval of the President (*supra*, note 19, p. 27).

> "ratify * * * acts which it might have authorized," see *Mattingly* v. *District of Columbia,* 97 U. S. 687, 690, and give the force of law to official action unauthorized when taken [citing cases]. And we think that Congress, irrespective of any doctrine of ratification, has, by the enactment of the statutes mentioned, in effect confirmed and approved the exercise by the Secretary of powers originally conferred on the Shipping Board.

In declaring a continuing policy of appropriation of the interest received from the deposits under regulations, Congress necessarily confirmed and approved the regulations under which the interest was earned. And since under the regulations the moneys were deposited under contracts with national banks calling for security, the giving of security was likewise approved. The taking of security had been reported to Congress (see *supra,* pp. 31–32), and, in a sense, was an integral, underlying part of the 1916 legislation.

Moreover, the House Committee Report reveals that when Congress raised the interest rate on deposit money orders to three percent in 1922 (Act of September 21, 1922, c. 370, 42 Stat. 1008), in order to encourage thrift among the employees of the Canal Zone, it did so on the basis of the letter of Secretary of War Baker to the Speaker of the House of Representatives, September 12, 1919,

quoted by the House Committee and reading in part as follows:

> It should be stated that the postal money-order funds of the Canal Zone are deposited in banks in the United States, upon which interest is paid, and which funds are secured by the deposit of certain standard bonds. The interest thus received will more than pay the proposed rate of 3 percent on deposit money orders, and therefore there will be no loss to the United States Government if the rate is increased as requested, * * *.[26]

In view of this 1916 legislation, supplemented by the 1922 legislation, the validity of the pledges securing the Canal Zone deposits is established by Congressional sanction.

The court below, in considering the effect of the 1916 statute, stated (R. 116, No. 6):

> And it would appear also to constitute recognition and approval of the depositing of money-order funds under regulations. But the difficulty is that, so far as we can discover or have been advised, there were no regulations in this respect in existence.

The court did not refer to Governor's Circular No. 660–2, promulgated in 1914.[27] This regulation

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[26] See H. Rept. No. 1083, 67th Cong., 2d Sess., p. 16.

[27] This is not contained in the answer, but was handed up to the court at the argument and was therefore available for consideration. *Minnesota* v. *United States*, 305 U. S. 382, 390. The Circular is set forth in Volume 7, Canal Record, May 13, 1914, page 365.

could not have been dismissed by the court below, as was the similar regulation promulgated in 1923 (Governor's Circular No. 660–61), on the ground that it was promulgated after the passage of the 1916 Act. We submit, on the contrary, that the 1916 and 1922 Acts constituted an approval of the taking of the security provided for in the 1914 regulation.

Finally, it may be noted that a wholly independent statute constitutes authority for the security safeguarding the Canal Zone deposits to the extent that they consist of deposit money order funds. The Act of February 16, 1933, c. 89, 47 Stat. 812 (48 U. S. C., Sec. 1323a), provides:

> SEC. 1. The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: *Provided, however,* That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

This Act embodied a long-continued policy of conformance to the continental practice.

On September 2, 1904, Act No. 8 of the Isthmian Canal Commission established a postal service to be conducted, regulated, and controlled by such of the laws, rules, and regulations of the Postal Service of the United States as were not inapplicable to Canal Zone conditions.

The United States postal savings system was established under a 1910 Act specifically requiring the board of trustees of the postal savings system to deposit postal savings funds in banks and to take security for the deposits, 39 U. S. C., Sec. 759. The President, by Executive Order of September 8, 1911 (Appendix, pp. 20–21), established a postal savings system, and provided for a board of trustees, consisting of local officers. This board was given power to make regulations for the receipt, deposit, investment, and repayment of the funds. The President thus made this new aspect of the United States postal service applicable to the Canal Zone, obviously intending it to apply so far as not inapplicable. The provision of the Federal statute for deposit by the continental board of trustees was inapplicable; but the provision for taking security was fully applicable to local conditions.

The Executive Order of September 5, 1914, repealed the system calling for postal savings certificates and set up deposit money orders, an equivalent *savings* system. The Act of August 21, 1916

(*supra,* pp. 34–35), authorized the payment of interest on "deposit money orders issued in the Canal Zone in lieu of postal savings certificates." Although these certificates were inapplicable to Canal Zone conditions (*supra,* note 7), the safeguarding of the local savings was certainly not inapplicable to local conditions. The security taken by the Treasurer, pursuant to the contracts of the Secretary of War incorporated into the Governor's regulations, for the deposit money order funds, was accordingly validated by the Act of February 1, 1933. The continental policy of protecting postal savings depositors by securing their funds was applicable to, and was carried over to, their thrifty counterparts in the Canal Zone.

It is no answer to this contention to point out that the deposit and pledge preceded the enactment of this measure. A statute containing authority to make a pledge will operate to validate security given prior to the statute on deposits made likewise prior to the Act. *McNair* v. *Knott,* 302 U. S. 369.

The court below suggested that the 1933 Act only sanctions regulations of the Governor. But the taking of security was in effect required by the regulations of the Governor of 1914 (*supra,* pp. 27, 28) and 1923 (*supra,* p. 28; R. 116, No. 6), through their reference to the contracts made by the Secretary of War (*supra,* pp. 25–28), promulgated both in 1914 and 1923. Moreover, we submit that though the Act authorized the Governor to promulgate

rules and regulations, its effect was not so confined, but extended approval to an existing institution insofar as it conformed to the continental postal service.

B. THE POWER EXISTS INDEPENDENTLY OF PROVISIONS OF LAW APPLICABLE SPECIFICALLY TO THE CANAL ZONE

As stated above (p. 18), the more general considerations indicating the power of national banks to secure deposits of federal agents keeping public moneys is presented in the brief of petitioners in *Inland Waterways Corp. et al.* v. *Hardee*, No. 6, this Term.

II

CONGRESS HAS NOT CONSENTED TO THE MAINTENANCE OF THIS SUIT, AND THEREFORE THE DISTRICT COURT WAS WITHOUT JURISDICTION

A. THE GOVERNMENT OF THE CANAL ZONE MAY CLAIM THE IMMUNITY OF THE UNITED STATES FROM SUIT

It has been repeatedly recognized, since the very beginning of this Government, that the United States without its consent cannot be sued in any court in this country, and that a controversy against the United States may be maintained only before Congress or such tribunal as it may designate. *Cohens* v. *Virginia*, 6 Wheat. 264, 411; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 384, 386; *Williams* v. *United States*, 289 U. S. 553, 573; *Keifer & Keifer* v. *Reconstruction Finance Corporation*, 306

U. S. 381. This immunity from judicial suit without consent stems from the sovereignty of the United States. *Williams* v. *United States, supra,* 573, 577. This Court has held it inherent in the nature of sovereignty not to be amenable to suit without consent, and has accordingly held the doctrine of immunity applicable to foreign states, and to the States of the Union, even in controversies not covered by the Eleventh Amendment.[28] *Hans* v. *Louisiana,* 134 U. S. 1; *Monaco* v. *Mississippi,* 292 U. S. 313, 321, 323; see *The Federalist,* No. 81; dissenting opinion of Justice Iredell in *Chisholm* v. *Georgia,* 2 Dall. 419, 429. The theoretical foundation of the immunity of the sovereign may be subject to academic dispute but the immunity itself is unquestioned. *Keifer & Keifer* v. *Reconstruction Finance Corporation, supra.*

We have seen the various steps by which Congress provided a civil government for the Canal Zone (*supra,* pp. 19–21). See *McConaughey* v. *Morrow,* 263 U. S. 39. The constitutionality of that undertaking cannot be disputed. Powers of sovereignty over the Zone were obtained by treaty with Panama. *Wilson* v. *Shaw,* 204 U. S. 24. Con-

[28] It has been said that, in determining whether a suit must be dismissed as one against, or affecting, the United States, exactly the same rules apply as obtain in determining whether a suit must be dismissed because of the sovereign immunity of a State. *Kansas* v. *United States,* 204 U. S. 331, 341; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387; *Hopkins* v. *Clemson College,* 221 U. S. 636, 645.

trol by Congress over the Canal Zone may thus be related to the treaty power, or, since historically the Zone was acquired as an adjunct of the Panama Canal, to the power to provide for the national defense, and to regulate commerce. *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, 406.

The Panama Canal and the Canal Zone constitute in effect merely one aspect of the Government of the United States. This Court has referred to the Panama Canal as one of the "minor independent departments" of the Government. *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415, 418. A suit against the Canal Zone must be dismissed as a suit against the United States, unless Congress has consented to its maintenance. *Compagnie Generale Transatlantique* v. *Governor of the Panama Canal*, 90 F. (2d) 225 (C. C. A. 5th), certiorari denied, 302 U. S. 720. No consent to the maintenance of this suit has been given.

In considering the application of the principle of sovereign immunity to this type of suit it is immaterial that the United States, or the Canal Zone, is not nominally a party of record. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296.[29] Two

[29] It was once held that whether a suit was one against a State was to be determined by the party named as defendant. *Osborn* v. *United States Bank*, 9 Wheat. 738; *Davis* v. *Gray*, 16 Wall. 203. This rule has been discarded. *Poindexter* v. *Greenhow*, 114 U. S. 270, 275, 287; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386.

types of reasoning and statement may be found in the cases. Thus this Court has said that the doctrine of sovereign immunity extends to suits "against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers,* 123 U. S. 443, 506; *Belknap* v. *Schild,* 161 U. S. 10, 25. The Court will refuse to take jurisdiction whenever it can be clearly seen that the State or the United States is an indispensable party defendant. *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, 451. Again this Court has held that although certain suits may purport to be brought against United States officers in their individual or personal capacity, when it appears that the defendants have no individual or personal interest in the controversy, and that the suit seeks to control their actions and exercise of functions as officers of the United States, the immunity from suit is applicable. *Belknap* v. *Schild, supra; Oregon* v. *Hitchcock,* 202 U. S. 60, 68; *Worcester County Trust Co.* v. *Riley, supra; Hagood* v. *Southern,* 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. at 457.

We propose to submit our contentions under these two different, though largely overlapping, headings. We shall first demonstrate that the United States is the real party against which the

respondent asked relief, and the one against which the judgment will effectively operate, because the judgment will affect the resources and interests of the United States. We shall then show that the suit is not maintained against petitioners in their personal capacity, but in their official capacity. Under either analysis, the United States is an indispensable party defendant.

B. THIS IS A SUIT FOR A DECREE OPERATING AGAINST THE UNITED STATES AND AFFECTING ITS RESOURCES AND INTERESTS

This suit is in truth directed at the property and interests of the United States. The sovereign is, therefore, an indispensable party defendant. Since it has not consented to this suit, it must be dismissed.

1. This is a suit to impress a constructive trust upon property held for the United States

We inquire first into the basis and object of this suit. The receiver of the District National Bank alleged that in 1914 the Secretary of War opened "Secretary of War, Canal Zone Funds" accounts and received a pledge of bonds to secure the deposit; that the pledge was unlawful and must have been received in trust for the Bank; and that when the bonds were sold after the Bank had closed and the proceeds paid by setting up a deposit account in the Hamilton National Bank, entitled "Secre-

tary of War, Canal Zone Funds," the proceeds were recoverable as a trust fund for the benefit of the creditors of the Bank (R. 2, 3, 6, 8). The bill prayed that the defendants, Mr. Dern, Secretary of War, and Mr. Flint, Chief of Washington Office of the Panama Canal, or their successors in office, account for certain sums (R. 6). Petitioners, substituted as successors of the original defendants, were ordered to pay over a certain amount of money (R. 23, 24).

In affirming this judgment, the Court of Appeals below (R. 28) referred to the allegations of the bill that the proceeds of the bonds were recoverable as a trust fund, and affirmed upon the basis of its opinion in *Inland Waterways Corp. et al.* v. *Hardee*, No. 6, this Term. That opinion considered first the case of the Merchant Fleet Corporation, held that the retention of the security after the bank's insolvency constituted a conversion of trust property, and held the Corporation liable in damages as a participant in a breach of trust though it had turned the proceeds over to the United States (R. 113, No. 6). However, as to the Canal Zone funds the court stated that "The pledged bonds or their proceeds are in the hands of the Secretary of War," and that "he must restore the bonds or refund the proceeds from their sale" (R. 119, No. 6).[30]

[30] The court's opinion is somewhat obscure. It referred to the liability of the Secretary of War as one who "participated in a conversion of the bank's assets" and must respond "just as any other person who had participated in a prefer-

The bill is essentially one to impress a constructive trust upon the proceeds of the bonds on the theory that upon the alleged conversion of the bonds equity would regard the proceeds as received by the participant in trust for the plaintiff, and enable the plaintiff to recover the proceeds. Apparently the court below, in approving the recovery, applied the principle that a constructive trust is an equitable remedy available in some cases of wrongdoing or inequitable conduct to prevent an unjust enrichment to the wrongdoer. *Chapman* v. *County of Douglas,* 107 U. S. 348, 355–358; *Angle* v. *Chicago, St. Paul, etc., Ry.,* 151 U. S. 1, 26; see Cardozo, J., in *Beatty* v. *Guggenheim Exploration Co.,* 225 N. Y. 380, 386, 122 N. E. 378; *American Law Institute,* Restatement, Restitution, § 160; *Bogert,* Trusts and Trustees, § 471; *Story,* Equity Jurisprudence (14th ed.), § 1663.

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ential transfer" (R. 119, No. 6). The confusion ensues from the failure to make considered reference to the effect of the substitution of Secretary Woodring into the present proceeding, which was begun against Secretary Dern. Plainly, petitioner Woodring, who did not become Secretary of War until 1936, did not "participate" in any preferential "transfer," which occurred, if at all, in 1933. He cannot be made personally liable in damages for the act of his predecessor in office. *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1. Secretary Woodring can be held responsible only to the extent that a personal action might have been commenced against him as the original defendant. *Ex parte La Prade,* 289 U. S. 444; *Allen* v. *Regents,* 304 U. S. 439, 444; *Union Trust Co.* v. *Wardell,* 258 U. S. 537, 542. See discussion, *infra,* pp. 74–86.

Whatever the applicability of this theory to governmental acts, and whatever its applicability in a case against a substituted officer, it seems plain, as we shall show, that the suit reaches assets of the United States and affects the governmental interests in the performance of the functions of the Canal Zone. From either view the United States is an indispensable party defendant.

2. The suit will operate to divest the United States of assets

(a) Viewing this case in its bare essentials, we find that by contract with the Canal Zone, through its executive officer, the Bank has given a pledge to the Canal Zone to secure its deposits; that the pledged assets have been sold and the proceeds turned over by the Bank to the Canal Zone and deposited in another bank for its own account. This established a credit on behalf of the United States, and constitutes property of the United States available to serve its governmental purposes. The respondent desires to attack the pledge and to reach the property which has been yielded to the former pledgee.[21] We submit that it cannot

[21] We do not conceive it to be material to the present argument that, as a matter of form, the District Court phrased its judgment in terms of an ordinary money judgment (R. 23–24). This form was worked out in order to make adjustment for certain credits admittedly owed to the United States in the event of a return of the securities delivered or the proceeds of the sale thereof. From the theory of the com-

take back the property from such pledgee without making it a party. The reduction of the funds available to the United States constitutes an obvious and direct injury to the United States, and demonstrates that, in the language of the cases, the United States is the real party in interest in the suit and the one against whom the judgment or decree effectively operates.

This common-sense conclusion is amply supported by the precedents. This Court has consistently refused to entertain suits which would operate to diminish the property interests of the United States. It was early recognized that "there is no distinction between suits against the government directly, and suits against its property," and that "direct suits cannot be maintained against the United States, or against their property," *The Siren,* 7 Wall. 152, 154; *Belknap* v. *Schild,* 161 U. S. 10; *Minnesota* v. *United States,* 305 U. S. 382, 386.[32]

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plaint and of the opinion of the Circuit Court of Appeals, it is plain that this judgment was imposed upon petitioners only because of their present control of the proceeds of the bonds, and that the judgment is enforceable only by virtue of that alleged control.

[32] In holding that a defendant's writ of error against a State is not a suit against the State, the Court pointed out that nothing was demanded from the State, and that "The party is not to be restored to the possession of anything." *Cohens* v. *Virginia,* 6 Wheat. 264, 410.

It need not be considered whether *The Davis,* 10 Wall. 15, can be extended to cases not sounding in salvage or admiralty, for in that case the Court relied upon the fact that the cargo was not in the custody of an official.

The doctrine emphatically requires the dismissal of actions to recover property claimed by the United States in which the interest of the United States will be effectively adjudicated. *Stanley* v. *Schwalby*, 162 U. S. 255; *Leather* v. *White*, 266 U. S. 592, affirming 296 Fed. 477 (C. C. A. 7th). An action will be dismissed if in effect it attempts to subject the property of the state to judicial process in order to satisfy a liability. *Christian* v. *Atlantic & N. C. R. Co.*, 133 U. S. 233; *Smith* v. *Reeves*, 178 U. S. 436; *Ex parte State of New York, No. 1*, 256 U. S. 490, 500–501.[33]

The Court will refuse to entertain actions qualifying or affecting the property interests of the state. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446. The immunity doctrine applies as well to moneys of the sovereign as to other types of property. See *Louisiana* v. *Jumel*, 107 U. S. 711, 718. And moneys not reposing in the Treasury may still be moneys of the United States. *Buchanan* v. *Alexander*, 4 How. 20. The state's immunity has necessarily been extended to moneys kept by it in a bank account separate from the other moneys of the state. *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151, 171, 172; *Lankford* v. *Platte Iron Works*, 235 U. S. 461.

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[33] *The Exchange*, 7 Cranch 116, and *Berizzi Bros. Co.* v. *Pesaro*, 271 U. S. 562, mark the failure of avowed attempts to reach the property of a sovereign.

A leading case is *Belknap* v. *Schild*, 161 U. S. 10, where a suit to enjoin defendant officials from infringing plaintiff's patent, through the use of government property, was dismissed for want of jurisdiction. The Court explained (p. 25) that—

> the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both the title and the possession; the United States were the only real party, against whom alone in fact the relief was asked, and against whom the decree would effectively operate; the plaintiff sought to control the defendants in their official capacity, and in the exercise of their official functions, as representatives and agents of the United States, and thereby to defeat the use by the United States of property owned and used by the United States for the common defense and general welfare; * * *

And in *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, applying this doctrine to property leased by the United States, Mr. Justice Holmes added that the right of the United States to use this property cannot "be interfered with behind its back and, as it cannot be made a party, this suit, * * * must fail" (p. 606). See also *United States ex rel. Goldberg* v. *Daniels*, 231 U. S. 218; *Hopkins* v. *Clemson College*, 221 U. S. 636. With like force it may be said here that petitioners

have no personal interest in this case, that respondent is pursuing property held for the United States which it will use for governmental purposes, that the United States is the only real party in interest, and that its right to the property cannot be tried behind its back, but must be litigated before Congress or such tribunal as it may designate.

(b) Such, in simple form, is the teaching of the cases. Respondent seeks to avoid their force by urging that in them the property concededly belonged to the United States. Attention is called (Br. in Opp., p. 16) to the statement in the *Bruce* opinion, that *Belknap* v. *Schild* differed from *United States* v. *Lee,* 106 U. S. 196, and other cases, "in the fact, among others, that the title of the United States to the caisson gate was admitted" (194 U. S. 601, at 606).

The significance of the *Lee* case will be fully considered below (pp. 58, *et seq.;* 75, 81). It is sufficient here, to repel respondent's argument, to note that the *Lee* case does not authorize the present suit merely because the respondent in the present case claimed the property in question and did not recognize or "admit" any continuing rights in the United States. Many plaintiffs alleging ownership have found this Court aware that their suits nominally against officers of the United States in reality were actions to obtain consideration of their claims against the United States itself. In *Oregon* v. *Hitchcock,* 202 U. S. 60, the State of Oregon, claiming lands under the swamp-land Acts, filed a bill

against the Secretary of the Interior, praying that he be enjoined from allotting the lands to certain Indians, and praying a decree establishing the title of the states. The Court dismissed the suit, relying upon *Minnesota* v. *Hitchcock,* 185 U. S. 373, 387, and stating that, the suit being one to divest the United States of title, the United States was the real party in interest, the officers having no pecuniary interest in the land or its proceeds.

In accord are *Naganab* v. *Hitchcock,* 202 U. S. 473; *Louisiana* v. *Garfield,* 211 U. S. 70, n. 78; *New Mexico* v. *Lane,* 243 U. S. 52, 58; *Leather* v. *White,* 266 U. S. 592.

In the *Lee* case, this Court entertained ejectment actions against officials in possession of land claimed by the plaintiff. Respondent's position apparently comes to this, that in the *Lee* case the Court had jurisdiction because the United States did not own the property, and similarly in the present case ownership or title was never in the United States (Br. in Opp., pp. 16–17). The fallacy implicit in this reasoning is the obvious consideration that the very question whether the pledge is valid, and whether the proceeds should be returned to the bank, is a question on which the United States is "entitled to be heard," or, more accurately put, is a question which must be heard where Congress directs. *Louisiana* v. *Garfield,* 211 U. S. 70; *Morrison* v. *Work,* 266 U. S. 481. Otherwise, every time the plaintiff claimed title to property claimed by or administered by the United States, a court could

avoid the doctrine of sovereign immunity by referring to the complaint's assumption that the property belonged to plaintiff, and then trying the merits.

Indeed, the question has already been settled by this Court. In *Louisiana* v. *Garfield,* 211 U. S. 70, the state filed a bill against the Secretary of Interior and Commissioner of the General Land Office to establish title to certain lands claimed under the swampland Acts. In response to a demurrer, lodged on the ground that the suit was against the United States, the state argued (see 211 U. S. at 72–73):

> According to the theory of the present bill, the title to the lands here in controversy has by conveyance not only passed out of the United States into the State of Louisiana, but by reason of a certain congressional statute of limitation and repose the title so conveyed is no longer subject to attack or suit by or on behalf of the Federal Government, and, therefore, the United States is not, and cannot be made, the real party defendant, for the all-sufficient reason that the United States has no present, prospective or ultimate interest in the land whatsoever. If, therefore, the court shall find that the legal title to the lands in dispute has passed out of the United States into the State of Louisiana, then there cannot be any doubt of the jurisdiction of this court to entertain the suit.

In dismissing the bill the Court refused to let jurisdiction depend upon the plaintiff's allegations. The Court first assumed for purposes of decision that it would have jurisdiction if the United States clearly had no title (p. 75).[34] It stated that at least the case was doubtful upon the merits, and held (p. 77):

> But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard.

Thus it was clearly held that although on the theory and allegations of the bill the United States had no interest, nevertheless in substance it was the real party in interest. The allegations of the com-

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[34] This assumption may have been intended merely to avert the implications of the state's contention that the defendants should not be permitted to claim immunity since they were violating the law (p. 73). The state relied upon federal statutes which marked out the defendants' duties and the Court might have felt that their actions could have been reviewed, if indisputably erroneous, by analogy to the rule in mandamus, since in an appropriate case the writs of injunction and mandamus are correlative to each other. *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171–172 (cited by the State of Louisiana, 211 U. S. at 73).

In the present case, however, there are doubtful issues which will not be settled even if a decision is rendered on the merits as to the corporate defendants in No. 6. There are additional grounds for holding valid the pledges to secure the Canal Zone accounts (*supra*, pp. 18–43). Moreover, the present case does not involve federal statutes imposing duties upon petitioners, which might afford an analogy to the procedure by way of mandamus even if plaintiffs should be clearly right.

plaint are not controlling. See also *Morrison* v. *Work,* 266 U. S. 481.[35]

(c) Upon analysis, *United States* v. *Lee* is seen to turn upon the fact that the action was ejectment. Accordingly, as the Court was careful to note, the action was one against individuals to recover *possession* (see 106 U. S. at 210, 219). The United States would not be bound by a judgment in ejectment against its officers. See 106 U. S. at 217, 222; *Carr* v. *United States,* 98 U. S. 433; *Hussey* v. *United States,* 222 U. S. 88, 93. But this inconclusiveness was already inherent in the common-law action of ejectment, which was an action for possession, not for seisin or title, and, indeed, a judgment was not conclusive upon the right of property even between the parties.[36]

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[35] In this case the Court dismissed a suit to enjoin the Secretary of the Interior from carrying out certain acts of Congress upon the ground that they unconstitutionally deprived the plaintiff and other members of an Indian tribe of property held by the United States for them as individuals. It was admitted that the acts were valid as to tribal property. The Court said that the claim of the United States that the property was tribal was at least a substantial one; that interference with its disposition of the lands by enjoining its officials would interfere with the performance of governmental functions and vitally affect interests of the United States; and that hence the United States was an indispensable party.

[36] *Sedgwick & Wait*, Treatise on Trial of Title to Land (2d ed. 1886), c. 1, secs. 41, 42, printed also in *3 Select Essays in Anglo-American Legal History*, pp. 611, 629; *Adams*, Ejectment, p. 351; *Freeman*, Judgments (5th ed. 1925), sec. 860; *3 Blackstone*, Commentaries (pp. 200–207).

One year later, Justice Miller considered his opinion in the *Lee* case in *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, and stated that the *Lee* case merely upheld an action in tort, ejectment being essentially an action of trespass, against individuals whose accountability to judgment and surrender of possession would not conclude the United States. The rule was shown to be different where the plaintiff advanced a claim of more than possession and revealed that the adverse party was the sovereign itself. In the *Cunningham* case, certain bondholders sued to foreclose their mortgage. The railroad had been seized under a lien by the Governor of Georgia and delivered to a receiver who sold it to the state. However, the plaintiffs alleged, *inter alia,* that the sale was absolutely void, the acquisition of title being beyond the constitutional power of the state (pp. 448, 459) and also because certain of the land was subject to plaintiff's lien but not the state's. As Justice Harlan's dissent pointed out, the officers were holding possession on behalf of the state but the plaintiffs were claiming that the alleged title of the state was not valid, and that a decree rendered in the absence of the state would not bind her (pp. 464, 465). Nevertheless, the Court dismissed the suit on the ground that the defendants sued had no personal interest in the matter, the entire interest adverse to plaintiffs being in the state.

Where the complaint rests upon an underlying claim of right which is opposed by the United States as the real party in interest, the Court will not entertain an action without the presence of the United States although the United States would not be bound in any event.[37] The principle has recently been supported by the decision in *Arizona* v. *California,* 298 U. S. 558, 571–572:

> Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California* v. *Southern Pacific Co.,* 157 U. S. 229, 251, 257; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199, 235,

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[37] More recently the distinction between a mere possessory action against a government official and one brought to try title was recognized in the case of *Appalachian Electric Power Co.* v. *Smith*, 67 F. (2d) 451 (C. C. A. 4th—1933), wherein the court said, p. 456:

"* * * The United States, not having consented to be sued, cannot be made a party defendant. *Carr* v. *U. S.*, 98 U. S. 433, 25 L. Ed. 209; *U. S.* v. *Turner* (C. C. A. 8th), 47 F. (2d) 86. Consequently, plaintiff's suit to quiet title will not establish title against the adverse claimant, and any relief which the court may grant will be nugatory. Ejectment would lie, because in that action relief is sought, not against the claim of the government, but against the wrongful possession of the government's agent. *U. S.* v. *Lee*, 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171. In a suit to quiet title, however, the matter in issue is the title itself; and no effective relief can be granted unless the adverse claimant is a party to the suit."

245–247; *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, 606; *Texas* v. *Interstate Commerce Comm'n,* 258 U. S. 158, 163. A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party. *Louisiana* v. *McAdoo,* 234 U. S. 627.

The present case does not involve a tentative dispute over possession, or even a hypothetical allegation that the bank's bonds were seized by individual trespassers, but rather a legal right to the proceeds of the bonds. The allegations show that the bonds were pledged under a contract with the Canal Zone, that the proceeds of the bonds were yielded to the pledgee Zone, and that the plaintiff accordingly seeks to impress a trust upon the proceeds in a Canal Zone checking account. The defendants have no personal interest; the United States has the entire interest adverse to plaintiff's claim of ownership of the bonds. It is for Congress to determine whether the Canal Zone's right to retain the proceeds may be heard in court or before any body other than itself. Compare *Leather* v. *White,* 266 U. S. 592, affirming 296 Fed. 477 (C. C. A. 7th);[38] *Cunningham* v. *Macon & Brunswick R. R. Co., supra.*

[38] Minority stockholders of a corporation brought suit against the agent of the United States on certain land, alleging that the land was corporation property which had been misappropriated by majority stockholders and directors who

Reference may also be made to *Ickes* v. *Fox et al.*, 300 U. S. 82. Plaintiffs, alleging a vested ownership of certain water rights, brought suit to restrain the Secretary of the Interior from enforcing an order diminishing those rights. A motion to dismiss alleged that the water rights were in the United States, that therefore the plaintiff's claim rested solely upon certain contracts with the United States, and that the relief sought was in substance the specific performance of the contracts (p. 96). In holding the United States not an indispensable party, the Court held that it would presume plaintiff had correctly alleged ownership of the water rights (p. 96).

We suggest in the first place that the reasoning of *Ickes* v. *Fox et al.* should be disapproved as resting upon the manifestly untenable premise that the plaintiff alone, in phrasing his complaint, may determine whether to concede that the United States has even a sufficient claim of title to permit it to invoke its sovereign immunity. The decision is not in harmony with several other cases decided by this Court and not discussed in the opinion. E. g., *Louisiana* v. *Garfield, supra; Oregon* v. *Hitchcock,*

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thereby created a fraudulent title to the land and transferred it to the United States. The lower court held that since the complaint prayed recovery of the land, the United States was an indispensable party. This Court affirmed without opinion.

supra; Morrison v. *Work, supra.*[39] In any event, *Ickes* v. *Fox* is distinguishable from this case, because the Court treated the question of property as an incidental part of plaintiff's case which was primarily a protest against interference with that property through the abuse of governmental power, citing *Philadelphia Co.* v. *Stimson,* 223 U. S. 605 (cf. discussion *infra,* p. 87). The present case is solely a proceeding to determine the rights to the proceeds of the bonds.

(d) The same result is reached, moreover, if the present case is approached in wholly different fashion. Respondent, in attacking the pledge to the Canal Zone as *ultra vires,* necessarily must admit that the United States has some interest in the proceeds and hence is an indispensable party defendant.

In *Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, the Court stated that no rights arise on an *ultra vires* contract. Viewed in context, this statement indicates that, upon the merits, if the pledge were *ultra vires,* the Canal Zone cannot insist upon any right against the receiver's attack. If the pledge were *ultra vires,* the receiver has the power, and even the duty, to take action to set aside an *ultra vires* transaction (see 291 U. S. at 260–261), but he

[39] Perhaps the case can be reconciled on the ground that the claim of the United States was not "substantial" and that the Secretary could be enjoined from committing an indisputable wrong. See *supra,* footnote 34.

would set it aside by suing the pledgee in order to terminate his interest, as in *Marion* v. *Sneeden,* 291 U. S. 262. The *Pottorff* case was not intended to overrule *Pullman's Car Co.* v. *Central Transportation Co.,* 171 U. S. 138, 151. In that case, where a corporation had no power to transfer its property under lease, the Court held that an action for the recovery of property transferred under an illegal contract is founded upon principles of justice and an implied promise to return it.[40] See also *Logan County Bank* v. *Townsend,* 139 U. S. 67; *Citizens' National Bank* v. *Appleton,* 216 U. S. 196; *Kerfoot* v. *Farmers' & Merchants' Bank,* 218 U. S. 281. It follows that, until execution of the judgment, the present holder has an interest in the property.

Though the obligation of an *ultra vires* contract is void, a transfer under the contract may pass title provided the parties intended title to pass and performed the requisite formalities. See Judge Learned Hand in *Metropolitan Trust Co.* v. *McKinnon,* 172 Fed. 846, 849–850 (C. C. A. 2d). We submit that even where a pledge is *ultra vires,* the pledgee does have *some* interest in the assets, subject to an implied promise to return them to the transferor. It is not disputed that the pledge was

[40] This doctrine would also support a suit in equity, upon a constructive trust against the pledgee—in this case, the Canal Zone. It may be doubted whether the court below was correct in holding the Fleet Corporation liable in damages for conversion (No. 6, R. 113).

voluntary and was intended to confer the rights of a pledgee upon the Canal Zone, and that the bank and the Comptroller of the Currency intended to pass title to the proceeds to the Canal Zone. Cases relied upon by respondent involving forcible takings, such as *United States* v. *Lee,* 106 U. S. 196, are accordingly not in point. Since in the present case the Canal Zone obtained some interest in the pledged bonds and in their proceeds, the United States is an indispensable party defendant.

In any event respondent must recognize that the moneys comprised in the Canal Zone account in the Hamilton Bank, or any other funds or bonds, which are the proceeds of the bonds once owned by the Bank, are not property to which he has title. Indeed, the very bringing of a suit to impress a constructive trust is recognition of an outstanding legal interest which plaintiff seeks to have impounded for his benefit. As stated in *In re Barney* [1892], 2 Ch. 265, 273, even a trustee *de son tort* must have "property either actually vested in him, or so far under his control that he has nothing to do but require that, * * * it should be vested in him." See also *Bogert,* Trusts and Trustees, sec. 471, n. 1. The cases impressing a constructive trust speak in terms of the possession by the defendant of such a legal title. See e. g., *Chapman* v. *County of Douglas,* 107 U. S. 348, 355–358; *Angle* v. *Chicago, St. Paul, etc., Ry.,* 151 U. S. 1, 26; *Prosser* v. *Finn,* 208 U. S. 67, 73; 3 *Pomeroy,* Equity Juris-

prudence (4th ed.), sec. 1044; *American Law Institute,* Restatement, Restitution, sec. 160, p. 641, 8.

The Canal Zone undoubtedly has a legal interest in the account in the Hamilton Bank. The legal interest applies to the entire account, whether or not equitably some of the funds should be turned over to respondent. Duly authorized officials other than petitioners would have authority to draw on such account. Nor could any drawing be effected, consonantly with valid regulations outstanding, for a purpose other than Canal Zone public purposes. Petitioners could not withdraw funds for a personal purpose. This legal interest of the Canal Zone seems indisputable and cannot be terminated in the absence of the Canal Zone or the United States as a party.

A suit upon a constructive trust requires, of course, a tracing of the trust *res. Texas & Pacific Ry.* v. *Pottorff,* 291 U. S. 245, 261. This consideration was not referred to by the court below, which apparently assumed, correctly or not, that in this case respondent had sufficiently traced the proceeds of the pledged bonds. Yet explicit study of the requirement that the *res* be traced illumines the interference with the sovereign implicit in a suit such as that maintained by respondent. The sovereign would surely have an interest in seeing that the court does not, by an incorrect rule of tracing, reach into funds which are admittedly the property of the Government. See (1937) 46 Yale

L. J. 538, 541–542. This interest alone should suffice to make the sovereign an indispensable party, especially since the rules of tracing are not crystallized, and the tracing disputes which have pervaded private controversies may become even more involved in the meshes of government organization and finance. Vindication of the equitable right of the suitor might well plunge courts into an exploration of government financial practices which could hardly be thought an appropriate judicial function.

(e) The judgment in this very case illustrates how even the admitted interests of the United States may be affected by an action to recover property equitably belonging to the plaintiff. The judgment provides (R. 23) that the defendants pay over $207,361.41, approximately the amount of the proceeds (R. 3), with interest from September 24, 1933, to September 25, 1933, as of which date a credit of 50% dividend on plaintiff's claim, in the sum of $103,680.70, is credited, the balance to bear interest at the legal rate from September 25, 1933, to December 7, 1936, as of which date a 25% dividend amounting to $51,840.35 is credited, the balance to carry interest until paid. It seems plain that if the judgment were only one for the recovery of plaintiff's property it should not carry interest at the legal rate but at most the amounts earned on that property, by way of interest paid by the Hamilton National Bank, etc. The plaintiff is obtain-

ing 6% interest from the Canal Zone, although the Canal Zone obtained less from the bank, and the difference, obviously, will be paid out of funds to which the Canal Zone is concededly entitled. To this extent, the judgment operates to obtain the unauthorized payment of interest by the United States, and must therefore, under any view of the case, be reversed.

(f) We have assumed that the Canal Zone deposit money order and money order funds deposited in the bank now being liquidated by respondent constituted moneys or property of the United States. We do not understand respondent to deny this.[41] But the opinion of the Court of Appeals, which is not clear, may have denied this proposition. (See R. 114, No. 6.)[42]

Defendants' pleadings clearly averred that the deposits in the respondent bank "were of monies of the United States," that the proceeds of the bonds were deposited for the credit of the United States, and that judgment against the defendants "would affect materially the United States in respect of its

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[41] The brief in opposition (p. 15) states that the petition makes a basic and erroneous assumption in overlooking a fundamental distinction between the original deposit by the Secretary of War and the money now on deposit with the Hamilton National Bank.

[42] See also R. 118 where the court relied on *O'Connor* v. *Rhodes*, 79 F. (2d) 146, where it considered the moneys of the Alien Property Custodian in question as moneys belonging eventually to private owners (p. 152). But cf. *Cummings* v. *Hardee*, 102 F. (2d) 622.

resources and assets." See paragraph 7, separate defense numbered 1 (R. 16); see also paragraph 9 (R. 20).

We see no basis for a contrary argument.[43] The moneys were collected by the Canal Zone and received by the Collector of the Panama Canal, the officer who collects amounts due the Canal Zone (Circular No. 660–2, Appendix, pp. 25–27). For purposes of administrative convenience they may be regarded as Canal Zone funds rather than United States funds which must be covered into the Treasury.[44] But the Canal Zone is merely one aspect of the Government of the United States (see *supra,* p. 45). The removal of those funds diminishes the resources of the United States. The public character of the funds is not lost because thereafter the Canal Zone deposited these funds in a bank. *Murray* v. *Wilson Distilling Co.,* 213 U. S. 151; *Lankford* v. *Platte Iron Works,* 235 U. S. 461; both cited *supra,* p. 52.

It is true that the moneys deposited were composed of funds with which residents of the Canal

[43] Defendants did aver, in a somewhat confusing manner, that the funds in question are not "public moneys" or "public funds" in the technical sense of having to be covered into the Treasury, or being subject to the official control of the Secretary of the Treasury. See paragraph 9, R. 20.

[44] An indictment for embezzling fines received in a Canal Zone magistrate's court was held not demurrable for laying ownership in the Panama Canal rather than the United States. *Fullerton* v. *Government of the Canal Zone,* 8 F. (2d) 968 (C. C. A. 5th).

Zone purchased money orders and deposit money orders. The receipt of these moneys by the Canal Zone undoubtedly gave rise to a debtor-creditor relationship. Although the Canal Zone undertook an obligation to make repayments, the moneys received became the funds of the Canal Zone, owned by the Canal Zone. Under any view, the interest on the deposit became part of the general revenues of the United States. (See R. 20, par. 9.) And it may be noted that profits from the Canal Zone postal service have been, from time to time, covered into the Treasury. Congress has plenary control over the money order funds and deposit money order funds. Congress provided for their disbursement to cover deficiencies in the postal service (see *supra,* pp. 23, 40).

Even if the property rights of the United States were less extensive than those outlined, its sovereign immunity might preclude this suit. See *Lankford* v. *Platte Iron Works,* 235 U. S. 461.[45]

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[45] There a depositor in an insolvent state bank brought suit to compel payment of his deposit by the State Banking Board out of the Depositors' Guaranty Fund. The Oklahoma Bank Guaranty Law provided that each bank should pay a small sum annually into a Guaranty Fund to be used by the State Banking Board to liquidate the deposits of failed banks. The Fund was not placed in the state treasury but was kept on deposit in the contributing banks. The plaintiff asserted that the suit was not against the state, since the Fund was not under the executive and legislative control of the state and could constitutionally be used solely for the purpose of paying depositors of failed banks. The Court held that the suit was against the state since the state

3. The suit affects governmental interest of the United States in discharging its obligation to the original depositors of the funds

The foregoing discussion has been predicated simply upon the direct monetary loss to the United States. But apart from pecuniary injury, a suit must be dismissed "where the State has otherwise such an interest in the object of the suit as to be a necessary party." *Belknap* v. *Schild,* 161 U. S. 10, 18. Cf. *Louisiana* v. *McAdoo,* 234 U. S. 627, 632, where a suit was dismissed as one which would affect governmental interests and "clog the wheels of government." In *Lankford* v. *Platte Iron Works,* 235 U. S. 461, the state had only a bare legal title to the depositor's guaranty fund involved, but yet the Court held the suit must be dismissed because of the state's interest in the administration of the fund. And in *Morrison* v. *Work,* 266 U. S. 481, the Court dismissed a suit on the ground that it interfered with the United States as guardian of a tribe of Indians and trustee in possession of the property. Similarly, the United States here is an indispensable party defendant because its governmental interests have obligated it to make payment

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had legal title to the Fund, and had an interest that the Fund be administered by the officers it had appointed. It seems plain that the interest of the United States is much stronger than that of Oklahoma in the *Lankford* case, since Oklahoma acquired a bare legal title over the funds and lacked legislative or executive control over them.

to the holders of the money orders and deposit money orders.

It seems indisputable that this fund represents a direct obligation of the Canal Zone, and thus of the United States, at least in one of its aspects.[46] It may be noted that section 9 of the Executive Order of September 8, 1911 (Appendix, pp. 20–21). setting up the Canal Zone postal savings system, expressly provided that payment pursuant to a court decree should operate as a "discharge of the United States and the Canal Zone Government from the claim or demand" of any person to the same. The Court of Appeals dismissed this branch of the argument with the terse statement that there was only a "moral obligation" (R. 118, No. 6). If it were not for the inability to sue the Canal Zone, there would have been an indisputable legal obligation. Compare *The Western Maid,* 257 U. S. 419. But if a decree will effectively deprive the United States of the means of discharging such an obligation, legally enforceable against a nonsovereign, the suit is one against the United States. *Kansas* v. *United States,* 204 U. S. 331.

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[46] Indeed, it may be, at least as to the deposit money orders, that the depositors are secured by the "faith of the United States" *eo nomine*, which is pledged to the payment of United States postal savings (39 U. S. C., Sec. 766). The Canal Zone Postal Service is governed by such rules of the U. S. Postal Service as apply to conditions in the Canal Zone. See Act of February 16, 1933, etc., discussed *supra*, pp. 40 *et seq.*

In *Kansas* v. *United States,* a suit was brought to establish title to certain lands which had been allotted in severalty to individual members of the Creek Nation, the bill praying that the allottees be directed to surrender possession. The Court held that the United States was the real party in interest as defendant, and as to this aspect of the case, stated (p. 342):

> * * * and if their allotments should be taken from them, which is part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof or for other lands, * * *.

It was not suggested that the Indians could in any way have enforced this demand.

Sloan Shipyards v. *U. S. Fleet Corp.,* 258 U. S. 549, cited by respondent (Br. in Opp., p. 14), is not to the contrary. In that case the United States gave its consent to suit.

We recognize that personal actions against an individual agent cannot be defeated on the ground that Congress might decide to save the defendant harmless. The interests of the United States are more directly affected when the decree takes away property which was available to the United States for the discharge of an "obligation" already subsisting, and an obligation of a type which would be legally enforceable as to an ordinary debtor. Especially is the United States the real party in interest when, in the present case, as in *Kansas* v.

United States, the discharge of such obligation constitutes an appropriate governmental function. It will hardly be denied that the agreement to pay the stated sums to the holders of the money orders and deposit money orders, undertaken at the time of the receipt of the moneys, represents a legitimate governmental interest. The savings and deposit money order systems were encouraged, and made interest-bearing, to promote thrift among the governmental employees. See H. Rept. No. 1083, 67th Cong., 2d Sess., p. 16.

C. THE PRESENT SUIT IS AN ACTION AGAINST THE DEFENDANTS IN THEIR OFFICIAL CAPACITY

We have shown above that the present suit affects the interests of the United States as the real party in interest. Upon an alternative approach, it is seen that the present suit is being maintained against each petitioner in his official, and not his individual, capacity.

1. *The suit cannot be maintained against petitioners in their official capacity*

Notwithstanding the doctrine of sovereign immunity, this Court has entertained actions against governmental officials if sued in their individual rather than in their official capacity, if sued as individual defendants, who act under color of authority of unconstitutional legislation by the state. *In re Ayers, supra,* 123 U. S. at p. 506; *Philadelphia Co.* v. *Stimson, supra,* 223 U. S. at pp. 619–620;

Cunningham v. *Macon & Brunswick R. R. Co., supra,* 109 U. S. at p. 452. But, except for injunction or mandamus suits relating to acts purely ministerial (*In re Ayers, supra*) this Court will dismiss suits not consented to by the sovereign where the plaintiff seeks to control the defendants "in their official capacity." *Belknap* v. *Schild, supra,* 161 U. S. at 25; *Hagood* v. *Southern,* 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. Co., supra,* 109 U. S. at 457; *Worcester County Trust Co.* v. *Riley, supra,* 302 U. S. at 296.

The Court of Appeals seems to be of the impression that an officer in possession of a fund can be "sued in his official capacity in a possessory action." *Cummings* v. *Hardee,* 102 F. (2d) 622, 628. The decisions just referred to, among many others, show that in the absence of consent by the United States, actions may be maintained against officers only in their individual capacity.

All the decisions sanctioning recapture of property from government officials are based upon this premise. The *Lee* case insisted that the ejectment action against the army officials in charge of a national cemetery was one "against Strong and Kaufman, as individuals, to recover possession of the property." 106 U. S. at 210; see also p. 219.[47]

[47] The *Lee* case was followed in *Scranton* v. *Wheeler,* 179 U. S. 141, and applied to state officers in *Tindal* v. *Wesley,* 167 U. S. 204. The defendant sued must actually be in possession. *Walker* v. *Ford,* 269 Fed. 877 (App. D. C.).

The Court relied upon *United States* v. *Peters,* 5 Cranch 115, where it was held that the claim of the State of Pennsylvania could not preclude inquiry into the title of certain certificates which the Treasurer of the State had retained as his private property (until the State should indemnify him against a specified liability), and which he kept in his private possession, drawing interest thereon, and passing them on to his executrices. And in *Cunningham* v. *Macon & Brunswick R. R. Co., supra,* the *Lee* case was explained as an action essentially one in trespass, i. e., one in tort, against a defendant who " is not sued as, or because he is, the officer of the government, but as an individual"—(109 U. S. at 452).

Similarly, actions in other cases brought to terminate possession of personal property were brought against the various defendants as individuals. In *Osborn* v. *United States Bank,* 9 Wheat. 738, notwithstanding an injunction restraining the auditor of Ohio from collecting a tax under an unconstitutional statute, his agent forcibly took from the Bank $100,000 in specie and bank notes, and turned this over, at least to the extent of $98,000, to the state treasurer, who retained it separately in a trunk, and in turn delivered it over to his successor. This Court ordered restitution of the $98,000 and directed payment of the remaining $2,000 by the original collector. The opinion regarded the suit as brought against the

defendants as individual trespassers, and concluded that the money turned over in violation of the injunction might be pursued so long as it remained a distinct deposit.[48]

In *Poindexter* v. *Greenhow,* 114 U. S. 270, the Court entertained an action in detinue for a desk seized by a trespasser—a tax collector who acted under an unconstitutional law. See also *Goltra* v. *Weeks,* 271 U. S. 536.[49]

Each of these cases involved a common law possessory action to require defendant to turn over an article or chose in his possession, an action maintained against him personally.

2. The basis and object of the present suit shows that it is one against the defendants in their official capacity

This suit was commenced against Secretary Dern. Even if he were liable as an individual in

[48] The Court also concluded that even if the original injunction had not been properly awarded, since the money taken from the Bank had been detained in a specific form, detinue would lie without any obstacle because of the interest of the State (pp. 858, 867–868). This aspect of the case seems to have been disapproved. See *infra*, pp. 85–86.

[49] The complaint alleged that a fleet of boats, leased from the United States was forcibly seized by an army officer in pursuance of an alleged conspiracy with the Secretary of War to take them without lawful right. Restoration of the boats was prayed, and also injunction against further disturbance. The Court took jurisdiction of the suit as one seeking to enjoin a trespass threatened by an official acting in abuse of his powers, but held the plaintiff not entitled to possession.

tort, it does not follow that Secretary Woodring is likewise liable. *Union Trust Co.* v. *Wardell,* 258 U. S. 537, 542. Secretary Woodring has been substituted into the action, and it is essential for plaintiff to show the personal liability of Secretary Woodring, i. e., to assert a ground of liability which might have been asserted as a basis for *commencing* an action against Secretary Woodring. *Ex parte La Prade,* 289 U. S. 444; Cf. *Allen* v. *Regents,* 304 U. S. 439, 444, where it was alleged that the successor collector would have collected the tax, unless restrained.

(*a*) *The relief sought involves judicial control over the exercise by petitioners of official functions.*—In *United States* v. *Lee, Osborne* v. *United States Bank,* and *Poindexter* v. *Greenhow, the* Court was able to say that the action was one against defendants in their capacity as individuals because the common law forms of action employed required the defendants to turn over possession of property, and this is relief which may be prayed of any individual.

Respondent does not allege that petitioner Woodring possesses any of plaintiff's property. The suit as to Secretary Woodring is apparently based upon his alleged possession of the proceeds of the bonds, a suit to establish a constructive trust. Plaintiff cannot even pretend to ask merely for a decree terminating defendant's personal possession, but must instead pray that Secretary Wood-

ring withdraw funds from the "Secretary of War, Canal Zone Funds" account in The Hamilton National Bank. This withdrawal from the Canal Zone bank account is the implicit crux of plaintiff's case.

The complaint alleges that the proceeds of the bonds, the deposit in the Hamilton National Bank, "became a trust fund for the benefit of the depositors * * * and, as such, are recoverable by plaintiff from said Secretary of War and said General Purchasing Officer of the Panama Canal, together with interest on said sums of $214,739.80 and $3,535.37 at the legal rate from September 24, 1933" (R. 3). The prayer for an accounting for these sums, with interest (R. 6), and the award of a money judgment in similar terms (R. 24), necessarily proceed upon the premise of Secretary Woodring's withdrawal from this account. Although an action theoretically might call for a surrender of personal possession without in any way implicating the sovereign behind the officer, it is plain that respondent's suit involves action not attributable to individuals but only to officials of the Canal Zone Government. The action seeks to control petitioners' exercise of official powers.

It is interesting to observe that although the complaints contain a saving allegation that the defendants are sued in both individual and official capacities (par. 5 (b)), each complaint later described the moneys as claimed from the defendants

"in connection with their official position relating to the Panama Canal" (R. 6, par. 9; No. 6, R. 11, par. 16);[50] and each complaint prays that Dern and Flint, "as Secretary of War and General Purchasing Officer and Chief of Washington Office, The Panama Canal, respectively, or their successors in office" be required to account for the sums (R. 6). And the decree was rendered against their successors in office. Compare *Hagood* v. *Southern,* supra, 117 U. S. at 69; *Governor of Georgia* v. *Madrazo,* 1 Pet. 110 at 123.

Finally, this action not only requires the exercise of official functions, but it requires their exercise in a manner not authorized by statute. Compare *Louisiana* v. *Jumel,* 107 U. S. 711, 721; *Cummings* v. *Hardee, supra.* Congress has provided for the appropriation of the funds in the control of the petitioner for two purposes—the repayment of the money orders and deposit money orders; and, to the extent of any "profit," the application to the deficit in the Canal Zone postal service. See Act of February 16, 1933, section 1, Appendix, p. 9.[51] There is no statutory appropria-

[50] Respondent in this case claimed the proceeds of the bonds (R. 3, par. 6), and respondent in No. 6 claimed the bonds or if sold the proceeds (R. 7, No. 6, par. 12).

[51] Any further excess (none so far has occurred, or seems probable) would presumably be covered into the Treasury of the United States, as was done with respect to $2,000,000, money order funds at a time when Congress had not made complete provision for their appropriation.

tion pursuant to which they can be devoted to the judgment in question.

(*b*) *The suit is based upon enrichment, and not mere possession.*—The personal possession which was the basis of the *Lee* and *Osborn* cases is a characteristic which can be asserted of any individual. When an action is based upon possession, there is some color for avoiding the doctrine of sovereign immunity by claiming to desire only that the personal possession of the defendant be terminated, and by ignoring the fact that he not only had personal physical possession but also had official possession. However, the constructive trust is an equitable doctrine utilized in cases of wrongdoing to avoid unjust enrichment (see *supra,* p. 49). Plainly, petitioners Woodring and Smith have not been *personally* enriched by any control of the proceeds of the bonds once transferred by the bank. The petitioners acquired control of the proceeds solely by virtue of their official position. Unless this Court affirms the result below, they will either use the proceeds in the course of their official duties or transfer them to their successors in office. Thus, in *Belknap* v. *Schild,* 161 U. S. 10, 26, the Court dismissed a suit for profits brought against an army official using a caisson gate in infringement of a patent and pointed out that the defendants themselves had not made any profits in addition to the gain to the United States from the saving in the cost of the gate. Similarly, here, at most it is the

defendants in their official capacity, i. e., representing the Canal Zone, who are unjustly enriched.

Petitioners have no legal interest in the proceeds as individuals, nor any right to vest such interest in themselves as individuals, nor have they appropriated the moneys to their own use, and in such circumstances a constructive trust cannot be established against them as individuals.[52] The same analysis would apply even if the proceeds of the bonds were, say, other bonds. In a careful pleading, personal possession might be predicated of Secretary Woodring without involving the United States; personal ownership or advantage, or enrichment, could not. No constructive trust action could be brought against the proceeds in his possession except upon a claim of right to proceed against the one for whom the proceeds were held, and that one being in this case the Canal Zone or the United States, the suit would have to be dismissed.

Governor of Georgia v. *Madrazo*, 1 Pet. 110, indicates that an equitable claim cannot be asserted against an officer in possession of property. A cargo of slaves belonging to Madrazo was seized by a privateer, and sold by an unrecognized tribunal to a person who brought them into Georgia. There

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[52] See *supra*, p. 65, citing *In re Barney* (1892), 2 Ch. 265, 273; Bogert, Trusts and Trustees, sec. 471, n. 1, and other authorities. Bogert cites *Allen* v. *Sarshik*, 299 Pa. 257, as holding it not necessary that the constructive trustee have legal title, but in that case the defendants appropriated money to their own use (pp. 262–263).

the slaves were seized, under an 1807 Act of Congress, and by a Georgia statute placed under the control of the Governor. The Governor sold the greater number of the slaves and paid the proceeds into the treasury. The court held that Madrazo's libel against the Governor for the restitution of the slaves should be dismissed as one against the state, that the demand was made upon the Governor, not personally but officially, that the decree below for restitution was pronounced, not against the person, but the officer, and indeed against the successor of the original defendant. The terse paragraph of the opinion apparently holds, *inter alia,* that no equitable claim to the slaves could be enforced against the Governor personally, since he had no personal interest in the slaves.[53]

(*c*) *The proceeds were not taken by petitioner Woodring, a successor officer whose possession is entirely official.*—Even if the present suit were not an attempt to declare a constructive trust, and were an action to recover the very bonds which once belonged to the insolvent bank, the doctrines established by this Court do not permit the recovery of negotiable securities except from the

[53] See *Karl Singewald*, The Doctrine of Non-Suability of the State in the United States (p. 55):

"The slaves had come into his [the Governor's] possession in perfectly lawful manner. The action, therefore, was not against him for wrongful possession, but rather in the nature of a suit to enforce an equitable claim to the slaves. Since the Governor had no personal interest in the slaves, the claim was not against him."

official by whom they were unlawfully taken. For even actions based on the officer's possession must allege that the possession is a personal rather than an official possession.

In *Osborn* v. *United States Bank,* 9 Wheat. 738, the court stated that since a person injured by the collection of a tax could bring an action in damages against the collector, he could also "sue for the specific thing, while yet in possession of the seizing officer" (p. 854). And in *Poindexter* v. *Greenhow,* 114 U. S. 270, 295, permitting an action of detinue against the tax collector, the court similarly explained that the action of detinue was essentially defensive in character, an action to resist an attempted wrong.[54]

In subsequent opinions in which this Court has distinguished suits where the state is the real party in interest from suits against an official as a tort feasor the scope of the latter type of suit was stated as including actions for damages, suits for injunctions, and actions "brought to recover money or property in the hands of such defendants, *unlawfully taken by them* * * *." *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 10. The same qualification

[54] The defensive nature of this action was important to the decision, for this Court has pointed out the significance, in showing a suit to be one against a state, of a prayer for affirmative relief against the official. *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 16; *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, at 453, 454.

appears in *In re Tyler,* 149 U. S. 164, 190; *Scott* v. *Donald,* 165 U. S. 58, 68.

In a suit to recover brought against the original taker the court steps in before the taker has turned the property over to his government. It is possible to think of him as an ordinary individual trespasser. However, when the property has been turned over to another official, a successor in office, or an auditor, etc., clearly, the latter's possession occurs only by virtue of his official capacity. When money is turned over to a successor in office, "he receives it officially" to apply to the purposes for which it had been retained. *Broome* v. *United States,* 15 How. 143, 158.

Actions to recover real property, as in *United States* v. *Lee,* may be put to one side, since any defendant in possession is regarded as a current trespasser. As to personalty, there is only one trespass, the taking. The possession of any official other than the one who originally seized the property occurs in the course of his official duties. *Governor of Georgia* v. *Madrazo,* 1 Pet. 110, *supra,* p. 82.

It is recognized that in *Osborn* v. *United States Bank, supra,* p. 84, the Court gave judgment for possession against the treasurer of the state, and, indeed, his successor. In this aspect, however, the case has been restricted to the ground that the money was turned over to the treasurer in violation of an order of injunction, so that the decree

of restoration corrected this violation of the injunction. *Cunningham* v. *Macon & Brunswick R. R. Co.,* 109 U. S. 446, 455. See note 48, *supra,* p. 77. The money was regarded as in law "kept out of the treasury." *Louisiana* v. *Jumel,* 107 U. S. 711, 725. Compare *Jones* v. *Securities Commission,* 298 U. S. 1, 16, noting generally that upon the filing of a suit for injunction "the hands of the defendant are effectually tied pending a hearing and determination, even though no restraining order or preliminary injunction be issued."

3. The suit cannot be maintained against petitioners as individuals, since they are acting in their official capacity in deciding a doubtful question arising out of a voluntary commercial transaction

In evolving doctrines justifying the maintenance of suits as brought against defendant officials in their individual capacity, this Court has been primarily concerned with the situation of official action taken under the authority of legislation which violates the Constitution. This Court, in some cases at least, has applied "the principle which justifies suits against individual defendants, who, under color of the authority of unconstitutional legislation by the State, are guilty of personal trespasses and wrongs." *In re Ayers, supra,* 123 U. S. at 506; *Osborn* v. *United States Bank, supra.* The essential element of this theory is that the interests of the state or the United States are deemed not involved because it may not be admitted that the state or the United States may violate the Constitution.

The unlawful act is not the wrong of the state, but "is the mere wrong and trespass of those individual persons who falsely speak and act in its name." *Poindexter* v. *Greenhow*, 114 U. S. 270, 290; *Ex parte Young*, 209 U. S. 123, 151; *In re Ayers, supra*, 123 U. S. at 507.

Similarly, this Court has held that the sovereign immunity cannot be claimed by an official acting in excess of his authority, with respect to matters not embraced within the statute giving him authority, or committing an abuse of power. Such an official may be sued at law (e. g., *Little* v. *Barreme*, 2 Cranch 170), or restrained in equity (*Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171; *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620; *Ickes* v. *Fox et al.*, 300 U. S. 82).

The Court considered that there were vital considerations leading it to take jurisdiction of actions though it knew that some interest of the state "may be more or less affected by the decision." An official transcending the statute whose warrant he claims is "thus unlawfully assuming to exercise the power of government against the individual owner." *Philadelphia Co.* v. *Stimson, supra*, 223 U. S. 605, at 621–622. And, within the limitations of the judicial process, this Court has endeavored to give protection against abuse of "the power of government."

This protection is the very pith of *United States* v. *Lee*, 106 U. S. 196. The Court insisted (p. 219)

that it could vindicate the plaintiff's "right to recover that which has been taken from him by force and violence, and detained by the strong hand," and continued (pp. 220–221):

> Shall it be said * * * that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?

The cases sanctioning actions for the recovery of property, as do their English progenitors,[55] all bear the impress of these doctrines. The *Osborn* and *Poindexter* cases, entertaining actions in detinue, spell out at length the predication of the action upon the unconstitutionality of the legislation involved. *United States* v. *Lee, supra,* upheld the permissibility of ejectment actions, in order to provide a basis for resisting governmental seizures. See *Tindal* v. *Wesley,* 167 U. S. 204, at 222. And in *Goltra* v. *Weeks,* 271 U. S. 536, the complaint alleged that a fleet of boats was seized by an army

[55] Thus, Lord Mansfield said, in *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 175: "Therefore to lay down in an English court of justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained."

officer, allegedly under claim of a lease, in pursuance of an alleged conspiracy with the Secretary of War to take them without lawful right. One cannot quarrel with such a decision, for an individual cannot claim to be acting in his official capacity when he acts "with malice, cruelty, or wilful oppression," which are "founded on considerations independent of public ends," *Wilkes* v. *Dinsman,* 7 How. 89, 130.

In some cases, it is true, an official may yet be held accountable for rights violated without resort to the power and strong hand of government. *Cammeyer* v. *Newton,* 94 U. S. 225, 234, for example, held an official liable in damages for patent infringement. But in such cases the Court redresses a violation of plaintiff's rights arising out of a unilateral act on the part of the official rather than out of a participation by plaintiff in a course of dealing with the defendant in his official capacity. The cases speak in terms of the personal liability of officials who have wrongfully "invaded" the plaintiff's property rights. *Philadelphia Co.* v. *Stimson,* 223 U. S. at 619; *Belknap* v. *Schild,* 161 U. S. 10, 18. And in distinguishing between wrongs arising out of voluntary transactions and forcible takings, we may renew our suggestion that the *ultra vires* of the pledge did not prevent some interest from passing to the pledgee, as was intended by the parties. See discussion, *supra,* p. 63 *et seq.*

The present case may be likened to *Wells* v. *Roper,* 246 U. S. 335. The Postmaster General decided to institute a new mail collection service and cancelled plaintiff's contract for the furnishing of automobiles, purporting to act under the terms of the contract. The plaintiff, regarding the cancellation clause as inapplicable, brought suit to restrain interference with plaintiff's performance of the contract. In dismissing the suit as one against the United States, the Court pointed out that the defendant was without personal interest and was acting in his official capacity, although his act may have violated plaintiff's rights. The Court said (pp. 337, 338):

> The argument to the contrary assumes to treat defendant not as an official but as an individual who although happening to hold public office was threatening to perpetrate an unlawful act outside of its functions. But the averments of the bill make it clear that defendant was without personal interest and was acting solely in his official capacity and within the scope of his duties. * * * It cannot successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken; nor can it be denied that the duty of the Postmaster General, and of the defendant as his deputy, was executive in character, not ministerial, and required an exercise of offi-

> cial discretion. And neither the question of official authority nor that of official discretion is affected, for present purposes, by assuming or conceding, for the purposes of the argument, that the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States.

Similarly, in the present case there was a lawful exercise of governmental power. In supervising the affairs of the Canal Zone, the Secretary of War was charged with functions executive in character, and requiring an exercise of discretion. Without doubt, he could have accepted a pledge from a state bank authorized to give security. It need not be considered whether his claim of executive discretion could be rejected in the event that he entered into a clearly illegal contract of pledge. The power of respondent bank to make a pledge for government officials is at least a doubtful one; and there seems little doubt as to the power to pledge security for the specific Canal Zone deposits. We may note an analogy to mandamus cases which may not be dismissed on the ground of sovereign immunity where the defendant is required to perform a plain official duty requiring no exercise of discretion (*Board of Liquidation et al.* v. *McComb*, 92 U. S. 531), but which can not be entertained against an official who is exercising his official dis-

cretion, even though he is wrong (e. g. *Ness* v. *Fisher*, 223 U. S. 683, 691; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324). Compare *Louisiana* v. *Garfield*, 211 U. S. 70, 75; *Morrison* v. *Work*, 266 U. S. 481, 485, discussed *supra*, pp. 56, 71.[56]

In summary, the significant aspect of the present case is that the alleged wrong to the plaintiff arose out of the bank's voluntary commercial transactions with an executive official, dealing with him as such. Cf. *Wells* v. *Roper*, *supra*. There is here no abuse of governmental power, no seizure of plaintiff's property, no "invasion" of plaintiff's rights. There exists none of the coercive elements which, under our theory of government, suggests that the suit may be regarded as one against the officer as an individual. Instead, we have a situation where the bank, and later the conservator yielding up the assets, dealt with the officials as officials representing their government. And now the receiver of the bank is attempting to litigate a doubtful question arising out of this voluntary commercial transaction by asserting that the officials were not really officials at all but merely individual wrongdoers. The case is aptly governed by the decisions on contracts entered into by government officials, where the official is presumed to be

[56] In *United States* v. *Lee*, the court noted that a contrary rule would permit the withholding of possession, however clear the plaintiff's right was (106 U. S. at 219, 220).

acting in his official capacity. *Hodgson* v. *Dexter*, 1 Cranch 345; *Parks* v. *Ross*, 11 How. 362.

D. THIS COURT SHOULD RECOGNIZE THE REAL INTEREST OF THE UNITED STATES IN THIS SUIT

We submit again that the plaintiff's assertion of right to the proceeds presents a controversy in which the defendants have no personal interest and in which the United States is the real party in interest. The suit attempts to reach funds of the Canal Zone, and to require that defendants exercise their official control over such funds. The controversy is one which should be submitted to Congress or a tribunal designated by Congress.

This suit is essentially predicated upon unjust enrichment. The tort actions sanctioned against officers as individuals have hitherto been actions singularly appropriate for the correction and deterrence of coercive action by government officials. Constructive trusts, on the other hand, are available with respect to noncoercive activities. "Unjust" enrichment is commonly found to arise out of fraud and sharp practice, unfair or unconscionable advantage, of abuse of confidential relationships and fiduciary obligations, and, as in the case at bar, of mistake. See *Bogert*, Trusts and Trustees Sec. 474; *American Law Institute*, Restatement, Restitution, passim, and particularly Section 160. The courts will be called upon to unscramble mutual mistakes as in the case at bar, or

to scrutinize activities of officers, undertaken with zeal and the best interests of the government in mind, for the nebulous range of "unfairness" which might appeal to the conscience of the chancellor. A monitory analogy may be found in Congress' reservation for itself rather than the Court of Claims of the adjustment of situations leading to the unjust enrichment of the United States. Thus, in situations where private parties would be subject to quasi-contractual obligations, suits cannot be maintained under the Tucker Act. *Merritt* v. *United States*, 267 U. S. 338; *United States* v. *Minn. Investment Co.*, 271 U. S. 212; *Goodyear Co.* v. *United States*, 276 U. S. 287.

In such situations, Congress may be able to act "justly" in a broad sense, balancing against the equities preferred by complainant matters not strictly relevant in a court room yet worthy of cognizance by statesmen and other practical men. Compare *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.

We recognize that only recently this Court referred to "the present climate of opinion which has brought governmental immunity from suit into disfavor." *Kiefer & Kiefer* v. *Reconstruction Finance Corporation*, 306 U. S. 381, 391. Yet that decision was based upon a construction of legislative intent. Submission of claims to tribunals other than Congress is more properly to be achieved by legislation than by artificially restrict-

ing the conception of what constitutes a suit against the United States. Cf. (1931) 44 Harv. L. Rev. 474. As this Court said in *Hill* v. *United States*, 9 How. 386, 389, with respect to the doctrine of sovereign immunity—

> A departure from this maxim can be sustained only upon the ground of permission on the part of the sovereign or the government expressly declared, and an attempt to overrule or to impair it on a foundation independently of such permission must involve an inconsistency and confusion, both in theory and practice, subversive of regulated order or power. * * *

Since Congress has not consented to the maintenance of this suit, the judgment should be reversed with directions to dismiss the complaint.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment should be reversed.

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APPENDIX

PART A.—STATUTES

1. Statutes Relating to Deposit of Public Money

R. S., Sec. 5153 (12 U. S. C., Sec. 90):

All national banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the Government: *Provided,* That the Secretary shall, on or before the 1st of January of each year, make a public statement of the securities required during that year for such deposits. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the national currency bills, by whatever association issued, which have been paid into the Government for internal revenue, or for loans or stocks: *Provided,* That the Secretary of the Treasury shall distribute the deposits herein provided

for, as far as practicable, equitably between the different States and sections.

Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State.

R. S., Sec. 3617 (31 U. S. C., Sec. 484):

The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on acount of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department.

R. S., Sec. 3618 (31 U. S. C., Sec. 487):

All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind, except the proceeds of the sale or leasing of marine hospitals, or of the sales of Coast Guard cutters, or of the sales of commissary stores to the officers and enlisted men of the Army, or of materials, stores, or supplies sold to officers and soldiers of the Army or of the sale of condemned Navy clothing, or of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall be deposited and covered into the Treasury as miscellaneous receipts, on account of "proceeds of Government prop-

erty," and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law.

R. S., Sec. 3621 (31 U. S. C., Sec. 495) provides:

> Every person who shall have moneys of the United States in his hands or possession, and disbursing officers having moneys in their possession not required for current expenditure, shall pay the same to the Treasurer, or some public depositary of the United States, without delay, and in all cases within thirty days of their receipt. And the Treasurer or the public depositary shall issue duplicate receipts for the moneys so paid, transmitting forthwith the original to the Secretary of the Treasury, and delivering the duplicate to the depositor: *Provided,* That postal revenues and debts due to the Post Office Department shall be paid into the Treasury in the manner required by law.

R. S., Sec. 5496 (Criminal Code, Sec. 96; 18 U. S. C., Sec. 182):

> Every banker, broker, or other person not an authorized depositary of public moneys, who shall knowingly receive from any disbursing officer, or collector of internal revenue, or other agent of the United States, any public money on deposit, or by way of loan or accommodation, with or without interest, or otherwise than in payment of a debt against the United States, or shall use, transfer, convert, appropriate, or apply any portion of the public money for any purpose not prescribed by law; and every president, cashier, teller, director, or other officer of any bank or banking association who shall violate any provision of this section is guilty

of embezzlement of the public money so deposited, loaned, transferred, used, converted, appropriated, or applied, and shall be fined not more than the amount embezzled, or imprisoned not more than ten years, or both.

2. Panama Canal Statutes

Act of June 28, 1902, c. 1302, 32 Stat. 481:

Sec. 2. That the President is hereby authorized to acquire from the Republic of Colombia, for and on behalf of the United States, upon such terms as he may deem reasonable, perpetual control of a strip of land, the territory of the Republic of Colombia, not less than six miles in width, extending from the Caribbean Sea to the Pacific Ocean, and the right to use and dispose of the waters thereon, and to excavate, construct, and to perpetually maintain, operate, and protect thereon a canal, of such depth and capacity as will afford convenient passage of ships of the greatest tonnage and draft now in use, from the Caribbean Sea to the Pacific Ocean, which control shall include the right to perpetually maintain and operate the Panama Railroad, if the ownership thereof, or a controlling interest therein, shall have been acquired by the United States, and also jurisdiction over said strip and the ports at the ends thereof to make such police and sanitary rules and regulations as shall be necessary to preserve order and preserve the public health thereon, and to establish such judicial tribunals as may be agreed upon thereon as may be necessary to enforce such rules and regulations.

* * * * *

Sec. 7. That to enable the President to construct the canal and works appurtenant

thereto as provided in this Act, there is hereby created the Isthmian Canal Commission, the same to be composed of seven members, who shall be nominated and appointed by the President, by and with the advice and consent of the Senate, and who shall serve until the completion of said canal unless sooner removed by the President, and one of whom shall be named as the chairman of said Commission. * * *

Act of April 28, 1904, c. 1758, 33 Stat. 429:

SEC. 2. That until the expiration of the Fifty-eighth Congress, unless provision for the temporary government of the Canal Zone be sooner made by Congress, all the military, civil, and judicial powers as well as the power to make all rules and regulations necessary for the Government of the Canal Zone and all the rights, powers, and authority granted by the terms of said treaty to the United States shall be vested in such person or persons and shall be exercised in such manner as the President shall direct for the government of said Zone and maintaining and protecting the inhabitants thereof in the free enjoyment of their liberty, property, and religion.

Sundry Civil Appropriations Act of May 27, 1908, c. 200, 35 Stat. 317, 386:

* * * * *

SEC. 3. All funds hereafter collected by the government of the Canal Zone from rentals of public lands and buildings in the Canal Zone and the cities of Panama and Colon, and from the Zone postal service, and from court fees, and collected or raised by taxation in whatever form under the laws of the government of the Canal Zone, are here-

by appropriated until and including June thirtieth, ninteen hundred and nine, as follows: The revenues derived from the postal service to the maintenance of that service; the remaining revenues, after setting aside a miscellaneous and contingent fund of ten thousand dollars, to the maintenance of the public school system in the Zone; to the construction and maintenance of public improvements within the Zone; to the maintenance of the administrative districts, including payment of salaries and wages incident thereto; to the maintenance of Canal Zone charity patients in the hospitals of the Isthmian Canal Commission, and to the maintenance of administrative district prisoners. A detailed and classified statement of all receipts and expenditures without the duplication of items under this paragraph shall be submitted to Congress after the close of the fiscal year ninteen hundred and nine.

Act of August 24, 1912, c. 390, 37 Stat. 560:

SEC. 2. That all laws, orders, regulations, and ordinances adopted and promulgated in the Canal Zone by order of the President for the government and sanitation of the Canal Zone and the construction of the Panama Canal are hereby ratified and confirmed as valid and binding until Congress shall otherwise provide. The existing courts established in the Canal Zone by Executive order are recognized and confirmed to continue in operation until the courts provided for in this Act shall be established. 48 U. S. Code 1309.

* * * * *

SEC. 4. That when in the judgment of the President the construction of the Panama

Canal shall be sufficiently advanced toward completion to render the further services of the Isthmian Canal Commission unnecessary the President is authorized by Executive order to discontinue the Isthmian Canal Commission, which, together with the present organization, shall then cease to exist; and the President is authorized thereafter to complete, govern, and operate the Panama Canal and govern the Canal Zone, or cause them to be completed, governed, and operated, through a governor of the Panama Canal and such other persons as he may deem competent to discharge the various duties connected with the completion, care, maintenance, sanitation, operation, government, and protection of the canal and Canal Zone. If any of the persons appointed or employed as aforesaid shall be persons in the military or naval service of the United States, the amount of the official salary paid to any such person shall be deducted from the amount of salary or compensation provided by or which shall be fixed under the terms of this Act. The governor of the Panama Canal shall be appointed by the President, by and with the advice and consent of the Senate, commissioned for a term of four years, and until his successor shall be appointed and qualified. He shall receive a salary of ten thousand dollars a year. All other persons necessary for the completion, care, management, maintenance, sanitation, government, operation, and protection of the Panama Canal and Canal Zone shall be appointed by the President, or by his authority, removable at his pleasure, and the compensation of such persons shall be fixed by the President, or

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by his authority, until such time as Congress may by law regulate the same, but salaries or compensation fixed hereunder by the President shall in no instance exceed by more than twenty-five per centum the salary or compensation paid for the same or similar services to persons employed by the Government in continental United States. * * * 48 U. S. Code 1305.

* * * * *

SEC. 7. That the governor of the Panama Canal shall, in connection with the operation of such canal, have official control and jurisdiction over the Canal Zone and shall perform all duties in connection with the civil government of the Canal Zone, which is to be held, treated, and governed as an adjunct of such Panama Canal. Unless in this Act otherwise provided all existing laws of the Canal Zone referring to the civil governor or the civil administration of the Canal Zone shall be applicable to the governor of the Panama Canal, who shall perform all such executive and administrative duties required by existing law. * * * 48 U. S. Code 1307.

Act of August 21, 1916, c. 371, 39 Stat. 527, 528 (48 U. S. C., Secs. 1324, 1325):

SEC. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding two per centum per annum.[1]

---

[1] Three per centum by amendatory Act of September 21, 1922, c. 370, sec. 11, 42 Stat. 1008, 48 U. S. C., Sec. 1324.

SEC. 7. That the interest received from the Canal Zone money-order funds deposited in banks under Canal Zone regulations shall be available to pay the interest on deposit money orders authorized by the preceding section. Such interest shall also be available to pay any losses which are chargeable to the Canal Zone postal service.

Act of February 16, 1933, c. 89, 47 Stat. 812 (48 U. S. C., Sec. 1323a):

SEC. 1. The postal service of the Canal Zone shall be governed by such of the laws, rules, and regulations of the Postal Service of the United States as are not inapplicable to the conditions existing in the Canal Zone, and the Governor of the Panama Canal is authorized to establish new post offices or discontinue those already established, to provide such rules and regulations as are necessary for the operation of the service, to appoint the personnel thereof, and to prescribe the postage stamps and other stamped paper which shall be used in such service: *Provided, however,* That the expenses of operating the Canal Zone postal service shall be defrayed, so far as possible, from the revenue derived therefrom, the use of which for that purpose is hereby authorized.

3. INLAND WATERWAYS CORPORATION

Act of June 3, 1924, c. 243, 43 Stat. 360, 361, 362, 363 (49 U. S. C., Sec. 151 ff.)

* * * * *

Sec. 2. The capital stock of the corporation shall be $5,000,000, all of which is hereby subscribed for by the United States. Such subscription shall be paid by the Secretary

of the Treasury, within the appropriations therefor, upon call from time to time by the Secretary of War. Upon any such payment a receipt therefor shall be issued by the corporation to the United States and delivered to the Secretary of the Treasury, and shall be evidence of the stock ownership of the United States. There is hereby authorized to be appropriated the sum of $5,000,000 for the purpose of paying such subscription.

Sec. 3. (a) Until otherwise directed by Congress, the corporation shall continue the operation of the transportation and terminal facilities now being operated by or under the direction of the Secretary of War, under section 201 of the Transportation Act, 1920, as amended, and shall, as soon as there is an improved channel sufficient to permit the same, initiate the water carriage heretofore authorized by law upon the Mississippi River above Saint Louis.

(b) If the Secretary of War deems it advisable to discontinue the operation of any part of the transportation or terminal facilities, or to develop and operate new lines, in order to give the public the proper service, he shall report thereon to Congress. The operation of any of such facilities shall not be discontinued and new lines shall not be developed or operated until authorized by Congress.

(c) The operation of the transportation and terminal facilities under this Act shall be subject to the provisions of the Interstate Commerce Act, as amended, and to the provisions of the Shipping Act, 1916, as amended, in the same manner and to the same extent as if such facilities were pri-

vately owned and operated; and all vessels of the corporation operated and employed solely as merchant vessels shall be subject to all other laws, regulations, and liabilities governing merchant vessels.

SEC. 4 (a) The Secretary of War shall appoint an Advisory Board of six members (hereinafter referred to as the "board") from individuals prominently identified with commercial or business interests in territory adjacent to the operations of the corporation. No member of the board shall be an officer, director, or employee of, or substantially interested in, any railroad corporation. Two of such members shall continue in office for terms of one year, and the remaining four for terms of two, three, four, and five years, respectively, from the date of appointment, the term of each to be designated by the Secretary of War. Each successor shall be appointed by the Secretary of War for a term of five years from the date of the expiration of the term of the member whom he succeeds, except that any successor appointed to fill a vacancy occurring prior to the expiration of a term shall be appointed only for the unexpired term of the member whom he succeeds. A vacancy in the board shall not impair the powers of the remaining members to execute the functions of the board.

(b) The members shall receive no salary for their services on the board but, under regulations and in amounts prescribed by the Secretary of War, may be paid by the corporation a reasonable per diem compensation for attending meetings of the board and for time spent on special service of the corporation, and their traveling expenses to

and from such meetings, or when assigned to such special service.

* * * * *

(d) The board shall meet for organization purposes when and where called by the Secretary of War, and thereafter at such times and places as the Secretary deems necessary. The board shall consider matters submitted to it by the Secretary of War, and make recommendations thereon, and from time to time advise him and make recomendations, in respect of the management and operation of existing facilities, or the development and operation of new lines.

SEC. 5. The corporation—

(a) Shall have succession in its corporate name during its existence;

(b) May sue and be sued in its corporate name;

(c) May adopt a corporate seal, which shall be judicially noticed, and may alter it at pleasure;

(d) May make contracts;

(e) May acquire, hold, and dispose of property;

(f) May appoint, fix the compensation of, and remove such officers, employees, attorneys, and agents as are necessary for the transaction of the business of the corporation; define their duties, and require bonds of them, and fix the penalties thereof;

(g) May incur obligations, borrow money for temporary purposes, and issue notes or other evidences of indebtedness therefor, but the aggregate amount of the indebtedness at any time shall not exceed 25 per centum of the value of the assets at such time;

(h) May exercise any of the functions vested in the Secretary of War by sections

201 and 500 of the Transportation Act, 1920, as amended;

(i) May, in the exercise of such functions, conduct the business of a common carrier by water, and maintain, manage, and operate properties held for or used in the service of transportation, or necessary or convenient to such use; and

(j) In addition to the powers specifically granted, shall have such powers as may be necessary or incidental to fulfill the purposes of its creation.

SEC. 6. (a) The Secretary of War shall transfer to the corporation all assets transferred to, or acquired, constructed, or operated by, or under the direction of, the Secretary of War, or which revert to the United States, under section 201 of the Transportation Act, 1920, as amended, or under the joint resolution entitled "Joint resolution to exempt the New York State Barge Canal from the provisions of section 201 of the Transportation Act, 1920, and for other purposes," approved February 27, 1921.

(b) The rights, privileges, and powers, and the duties and liabilities, of the Secretary of War, or the inland and coastwise waterways service, in respect of any contract, loan, lease, account, or other obligation, under section 201 of such Act, or under such joint resolution, shall become the rights, privileges and powers, and the duties and liabilities, respectively, of the corporation.

(c) All money available for expenditure or the making of loans under such joint resolution or section 201 of such Act, and all money repaid in pursuance of loans made under subdivision (c) of section 201 of such

Act, shall be available for expenditure or the making of loans by the corporation under this Act.

(d) The enforcible claims of or against the Secretary of War, or the inland and coastwise waterways service, in respect of the operation, construction, or acquisition of any such transportation facilities, shall become the claims of or against, and may be enforced by or against, the corporation.

(e) The Secretary of War shall adjust and appraise the value, at the time of transfer, of all assets transferred to the corporation under this Act, and such value shall be entered upon the books of the corporation.

(f) In the determination of the running of the statute of limitations or of any prescriptive right, the period of time shall be computed in the same manner as though this Act had not been passed.

Shipping Act of 1916, c. 451, 39 Stat. 728, 731:

SEC. 11. That the board, if in its judgment such action is necessary to carry out the purposes of this Act, may form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The total capital stock thereof shall not exceed $50,000,000. The board may, for and on behalf of the United States, subscribe to, purchase, and vote not less than a majority of the capital stock of any such corporation, and do all other things in regard thereto necessary to protect the interests of the United States and to carry out the purposes of this Act. The board, with the approval of the President, may sell any or all of the stock of the

United States in such corporation, but at no time shall it be a minority stockholder therein: *Provided,* That no corporation in which the United States is a stockholder, formed under the authority of this section, shall engage in the operation of any vessel constructed, purchased, leased, chartered, or transferred under the authority of this Act unless the board shall be unable, after a bona fide effort, to contract with any person a citizen of the United States for the purchase, lease, or charter of such vessel under such terms and conditions as may be prescribed by the board.

* * * * *

Merchant Marine Act of 1920, c. 250, 41 Stat. 988, 990:

SEC. 4. That all vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agencies whatsoever in pursuance of authority conferred by the Acts or parts of Acts repealed by section 2 of this Act, or in pursuance of the joint resolution entitled "Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes," approved May 12, 1917, with the exception of vessels and property the use of which is in the opinion of the President required by any other branch of the Government service

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of the United States, are hereby transferred to the board: *Provided,* That all vessels in the military and naval service of the United States, including the vessels assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction or under contract by the War Department, shall be exempt from the provisions of this Act.

PART B.—ORDERS AND REGULATIONS

1. Act No. 8, Enacted September 2, 1904

* * * * *

By authority of the President of the United States, be it enacted by the Isthmian Canal Commission:

* * * * *

Sec. 9. There is hereby created and established the office of Treasurer of the Canal Zone. * * *

He shall receive, safely keep, and duly account for all moneys belonging to the Government of the Canal Zone, from whatever source derived. He shall take proper receipts for all moneys paid or disbursed and give proper receipts for all moneys received by him by virtue of his office.

* * * * *

Sec. 42. By Executive Order dated June 24, 1904, provision was made as follows:

> That a post office be established in each of the following-named towns of the Canal Zone, to-wit: Cristobal, Gatun, Bohio, Gorgona, Bas Obispo, Empire, Culebra, La Boca, and Ancon. The post offices at Cristobal and Ancon shall be money-order offices.

The post office at Bas Obispo is discontinued, and post offices are hereby established at San Pablo and Matachin.

There is hereby created and established a postal service for the Canal Zone, Isthmus of Panama.

It shall be the duty of the Postal Service to administer the affairs of the post offices and the postal affairs of the Zone.

The Postal Service of the Canal Zone shall be conducted, regulated and controlled by such of the laws, rules, and regulations of the postal service of the United States as are not inapplicable to the conditions of law and fact existing in the Canal Zone, and the laws enacted and the rules and regulations adopted by the Isthmian Canal Commission.

* * * * *

SEC. 44. All moneys collected or received by the Director of Posts by virtue of his office shall be deposited forthwith with the Treasurer of the Canal Zone, and a receipt in duplicate therefor issued by the Treasurer to the Director of Posts, who shall attach the original thereof to his monthly account. [Laws of the Canal Zone, Isthmus of Panama, 1906, p. 52 *et seq.*]

2. ORDER OF THE SECRETARY OF WAR, PROMULGATED NOVEMBER 5, 1905

* * * * *

Now, therefore, by the authority of the President of the United States, and with the concurrence and approval of the Secretary of War first had, be it ordered by the Isthmian Canal Commission that:

SECTION 1. The following rules and regulations shall apply to the accounting system of the Govern-

ment of the Canal Zone, and shall take effect and be in force July 1, 1905.

* * * * *

MONEY ORDER ACCOUNTS

RULE 21. The Auditor shall keep the accounts of the Money Order Business separately, and in such manner as to show the number and amount of money orders issued at each post office, and the number and amount paid, and the fees received. The Auditor shall certify quarterly the receipts as fees from the sale of money orders and require the same to be deposited with the Treasurer of the Zone as postal receipts. Losses of money order funds in transit, by fire, burglary, or other unavoidable casualty for which credit may be given shall be deducted from the fees collected before the quarterly transfer to the depositary of such fees as postal receipts.

RULE 22. Transfers of money from postal receipts to money order funds may be made by the postmaster, under such regulations as the Auditor may prescribe when his receipts from the sale of money orders are insufficient to pay the money orders drawn upon his office. Credit for such transfers of postal funds to money order funds will be taken in the monthly postal account of the postmaster. At the close of each quarter all such transfers of funds from postal to money order accounts shall be deposited by the Director of Posts, or other officer in charge of postal affairs, with the Treasurer of the Zone, as revenues for the service of the Division of Posts upon certification of the Auditor of the amount of such funds to be so deposited.

RULE 22½. The Treasurer of the Canal Zone shall be required to keep an account of money order

funds deposited by postmasters with him to the credit of the Director of Posts, subject to his official draft, when countersigned by the Local Auditor, drawn for needful advances to postmasters of funds with which to pay money orders lawfully drawn upon them, and it shall be the duty of all postmasters to make prompt remittances to the Treasurer of the Zone of all money order funds including all fees thereon, in their hands, not needed to meet drafts of which they have notice, the same to be deposited to the credit of the Director of Posts as money order funds.

* * * * *

WM. H. TAFT, *Secretary of War.*

NOVEMBER 5, 1905.

3. MINUTES OF MEETING OF ISTHMIAN CANAL COMMISSION, MAY 2, 1906

The Chairman also stated that steps were being taken to establish a money-order system on the Isthmus, explaining that such a system would not only serve as a convenience to the employees, but would enable the Commission to avail itself of the money received, following each pay period, reducing to that extent the necessary shipment of funds required monthly by the Disbursing Officer.

Pursuant to the authorization of the Secretary of War * * * it was—

Resolved, That * * * the action of the Governor of the Canal Zone, after conference with the Chairman and approved by the Chairman while on the Isthmus, for the immediate installation of a postal money-order system in the Canal Zone postoffices, be approved.

4. Executive Order No. 1409, Promulgated September 8, 1911

Establishing the postal-savings system in the Canal Zone

By virtue of the authority vested in me, I hereby establish the following Order for the Canal Zone:

Section 1. There is hereby established in the post-offices of the Canal Zone a postal-savings system, to be operated without the payment of interest on the deposits under such rules and regulations as may be now or hereafter adopted.

Sec. 2. There is hereby created a Board of Trustees for the control, supervision, and administration of the postal savings depository offices designated and established under the provisions of this Order, and of the funds received as deposits at such postal savings depository offices by virtue thereof. Said board shall consist of the Collector of Revenues of the Canal Zone, the Auditor of the Canal Zone Government, and the Treasurer of the Canal Zone, severally, acting *exofficio,* and shall have power to make all necessary and proper regulations for the receipt, transmittal, custody, deposit, investment, and repayment of the funds deposited at postal savings depository offices; the regulations above mentioned to be subject to the approval of the Chairman of the Isthmian Canal Commission.

* * * * *

Section 5. At least one dollar, or a larger amount in multiples thereof, must be deposited before an account is opened with a person depositing the same; and one dollar, or multiples thereof, may be deposited after such account has been opened. Postal savings deposits will be evidenced by postal

savings certificates issued in fixed denominations of $1, $2, $5, $10, $20, $50, $100, each bearing the name of the depositor, the number of his account, the date of issue, and the name of the depository office.

SECTION 7. Postal-savings funds received under the provisions of this Order shall be deposited with the Treasurer of the Canal Zone under such regulations as the Board of Trustees may prescribe.

* * * * *

SECTION 9. That the final judgment, order, or decree of any court of competent jurisdiction adjudicating any right or interest in the credit of any sum deposited by any person with the postal-savings depository, if the same shall not have been appealed from, and the time for appeal have expired, upon submission to the Collector of Revenues of a copy of the same, duly authenticated in the manner provided by the laws of the United States for the authentication of the records and judicial proceedings of the courts of any state or territory, or of any possession subject to the jurisdiction of the United States, when the same are proved or admitted within any other court within the United States, shall be accepted by the Board of Trustees as conclusive of the title, right, interest, or possession so adjudicated; and any payment of said sum in accordance with such order, judgment, or decree shall operate as a full and complete discharge of the United States and the Canal Zone Government from the claim or demand of any person or persons to the same.

* * * * *

WM. H. TAFT.

THE WHITE HOUSE,
September 8, 1911.

5. Executive Order to Establish a Permanent Organization for the Panama Canal (Published in the 660 Series of Governor's Circulars in re General and Separate Organizations)

By virtue of the authority vested in me, I hereby enact the following order, creating a permanent organization for the Panama Canal, under the Act of Congress "To provide for the opening, maintenance, protection, and operation of the Panama Canal, and the sanitation and government of the Canal Zone," approved August 24, 1912 [Sec. 4, Panama Canal Act].

Section 1. The organization for the completion, maintenance, operation, government and sanitation of the Panama Canal and its adjuncts and the government of the Canal Zone shall consist of the following departments, offices and agencies, and such others as may be established by the Governor of the Panama Canal on the Isthmus or elsewhere with the approval of the President, all to be under the direction of the Governor, subject to the supervision of the Secretary of War.

* * * * *

ACCOUNTING DEPARTMENT

There shall be an Accounting Department under the supervision and direction of the Auditor, with an assistant in the United States [Sec. V, Executive Order of Mar. 2, 1914, p. 162, defines duties of Assistant Auditor in the United States]. The duties of the department shall include all general bookkeeping, auditing and accounting, both for

money and property, costkeeping, the examination of payrolls and vouchers, the inspection of time books and of money and property accounts, the preparation of statistical data, and the administrative examination of such accounts as are required to be submitted to the United States Treasury Department; and the collection, custody and disbursement of funds for the Panama Canal and the Canal Zone. These same duties shall be performed for the Panama Railroad Company on the Isthmus when not inconsistent with the charter and by-laws of that Company. The department shall be charged with the handling of claims for compensation on account of personal injuries and of claims for damages to vessels. Within the limits fixed by law, the duties and financial responsibilities of the officers and employees charged with the receipt, custody, disbursement, auditing and accounting for funds and property shall be prescribed in regulations issued by the Governor, with the approval of the President. The Auditor shall maintain such a system of bookkeeping as will enable him to furnish at any time full, complete and correct information in regard to the status of appropriations made by Congress, the status of all other funds, and the amounts of net profits on all operations, which are to be covered into the Treasury as required by the Panama Canal Act.

* * * * *

SEC. 3. This order shall take effect from and after the 1st day of April, 1914, from which date the Isthmian Canal Commission, together with the present organization for the Panama Canal and

the Canal Zone, shall cease to exist, in acordance with the terms of the above-mentioned Act of Congress.

WOODROW WILSON.

THE WHITE HOUSE,
January 27, 1914.

6. BY VIRTUE OF THE AUTHORITY VESTED IN ME, I HEREBY ESTABLISH THE FOLLOWING ORDER FOR THE CANAL ZONE

SECTION 1. The Executive Order of September 8, 1911, establishing the Postal Savings System in the Canal Zone, is hereby repealed, PROVIDED THAT accounts, opened in accordance with that order, and the regulations established thereunder, shall continue as prescribed in said order and regulations until they are finally closed by the withdrawal of the deposits.

SECTION 2. For the accommodation of persons desiring to deposit their savings in the post offices of the Canal Zone, money orders may be issued in the Canal Zone payable to the purchaser at the office of issue, for which no fee shall be charged.

SECTION 3. This order shall take effect from and after October 1, 1914.

WOODROW WILSON.

THE WHITE HOUSE,
5 September 1914.

THE PANAMA CANAL

OFFICE OF THE GOVERNOR,
Culebra, C. Z., April 1, 1914.

Circular No. 660–2.

ACCOUNTING DEPARTMENT

AUDITOR OF THE PANAMA CANAL

1. The Auditor of The Panama Canal is charged with the immediate direction and control of accounting, and the auditing and settlement of claims for The Panama Canal and Canal Zone and for the Commissary Department of The Panama Railroad on the Isthmus. He has supervision and control over the acceptance of bonds, the methods of keeping records and accounts of receipts and disbursements of moneys received by all officers and agents of The Panama Canal and Canal Zone by virtue of their offices or positions, and the methods of safeguarding such moneys. He shall prescribe all forms for recording the receipt and disbursement of moneys and property and all forms necessary for use in accounting for money and property, except as otherwise prescribed in accordance with law. He is authorized, and it shall be his duty, to examine the books, contracts, records, and accounts of money and property in the possession of all officers and agents of The Panama Canal and Canal Zone, and of the Commissary Department of the Panama Railroad on the Isthmus. He shall perform all the duties heretofore assigned to the Examiner of Accounts or to the Auditor of the Canal Zone Government, and the additional duties prescribed by the Executive Order of January 27, 1914.

DISBURSEMENTS—PAYMASTER

2. The Paymaster is charged with the payment on the Isthmus of all moneys appropriated for The Panama Canal and expendable under the direction of the Governor. The Paymaster will make payments only on vouchers or pay rolls, time vouchers or pay receipts which have been examined and audited by the Auditor. All collections made by the Paymaster on the pay rolls shall be paid by him to the Collector upon the certificate of the Auditor specifying the amount and the source from which derived, except refundments of overpayments and amounts due The Panama Railroad Company for supplies or services rendered employees, and except other deductions authorized to be made and to be paid to other branches of the service, to contractors or other persons. All other duties performed by the Disbursing Officer of the Isthmian Canal Commission prior to April 1, 1914, will be performed by the Collector.

RECEIPTS—COLLECTOR

3. The Collector shall perform all duties heretofore performed by the Treasurer of the Canal Zone and, in addition, shall collect or receive all amounts due The Panama Canal and Canal Zone. He shall transfer all cash received by him and not required for the performance of his duties, to the Paymaster. For the funds of The Panama Canal, he shall take the Paymaster's receipts; for Canal Zone, money order, postal savings bank, clubhouse, and other trust funds and security deposits, he shall take the draft of the Paymaster on the Treasurer

of the United States and shall deposit same in depositories under the contracts entered into by the Secretary of War. He shall have such number of deputies or assistants as may be assigned to him. All moneys, records, and papers of the Treasurer of the Canal Zone, and all moneys, records, and papers of the Collector of Revenues and his deputies, insofar as they relate to the collection of moneys, shall be transferred to the Collector of The Panama Canal.

4. The Collector will render an account for all public moneys of the United States received by him to the Auditor for the War Department, through the Auditor of The Panama Canal. The account will be forwarded to the Auditor of The Panama Canal within ten days after the close of each month, and will be forwarded by the Auditor of The Panama Canal to the Auditor for the War Department within ten days thereafter.

5. All amounts due The Panama Canal or Canal Zone will be collected by the Collector or his deputies whenever practicable. Bonded employees of the various departments and divisions designated by the Auditor may make collections for minor services or sales. In the performance of their duties in connection with receiving, handling, and refunding cash, such employees shall be subject to the direction of the Auditor. Such bonded employees shall issue receipts in triplicate, giving the original to the party making deposit and sending the duplicate to the Auditor.

* * * * *

PART C.—DECISIONS AND OPINIONS

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, June 16, 1931.

A–7515.
A–12887.

UNITED STATES SHIPPING BOARD:

GENTLEMEN: It has been the practice of the Merchant Fleet Corporation to maintain accounts in certain banks in the United States designated by the Corporation for the deposit of moneys derived from operation of vessels by the Managing Operators, good faith deposits, receipts from sales and miscellaneous collections.

The vessels and other property in custody of the Board constitute property of the United States, controlled through its agent, the Merchant Fleet Corporation, and moneys derived from the business operations of the Fleet Corporation are moneys of and for the use of the United States. Receipts of the Government go into the General Fund of the Treasury and are available for the general purposes of Government unless the Congress directs that they be set apart for a specific use in a special fund. The fact that the Congress has included the moneys received from operations and sale of property in the appropriation "United States Shipping Board" does not affect or alter their character but, on the contrary, establishes the fact that such amounts constitute moneys of the United States. Furthermore no provision was made in the Shipping Act of 1916 or Merchant Marine Acts of 1920 and 1928 which would authorize the deposit of Government moneys except as provided by law. Section 3617, Revised Statutes.

It is proposed, therefore, that all domestic collections, other than special deposits, for each fiscal year be deposited into the Treasury to the credit of specified receipt accounts, which may be designated "United States Shipping Board Operating Receipts" and "United States Shipping Board Sales Receipts." Operating receipts so covered in would be placed to the credit of the appropriation "O–551 United States Shipping Board Fund." Sales receipts so covered-in would be placed to the credit of two funds—"Liquidation Fund" from which expenses of liquidation may be paid within limitations of the appropriation act and "08557 Construction Loan Fund, United States Shipping Board." Special deposit collections would be deposited in the disbursings officer's official checking account with the Treasury. All disbursements would be made by disbursing officer's checks drawn on the Treasurer of the United States against advances made them on accountable warrant.

It is requested that the matter be given consideration and this office advised as to the views of the Board.

Respectfully,

(Signed) J. R. McCarl,
Comptroller General of the United States.

Comptroller General
of the United States,
Washington, February 8, 1932.

United States Shipping Board.

Sirs: There has been received your letter of August 19, 1931, in reply to office letter dated June

16, 1931, relative to the practice of depositing public moneys in banks by the Merchant Fleet Corporation.

Since receipt of your letter copies of resolutions adopted by the Board on November 4 and 11 and December 9, 1931, have been received. Resolution adopted November 4, 1931, provides:

> WHEREAS, monies of the United States have been deposited in divers banking institutions by the Merchant Fleet Corporation; and
>
> WHEREAS, it is provided under Title 12, Section 90, of the Compiled Statutes, that the Secretary of the Treasury shall require all national banking institutions who are acting as financial agents of the Government to give satisfactory security by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them; and
>
> WHEREAS, it is the desire of the United States Shipping Board to follow the plan thus outlined by Act of Congress;
>
> RESOLVED, that all banks and banking institutions which have or shall have monies of the United States in the name of the United States Shipping Board Merchant Fleet Corporation be and they are hereby required as a condition of the said deposit to give satisfactory security to said Merchant Fleet Corporation by the deposit of United States Bonds and otherwise for the safekeeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as depositaries of such monies.
>
> FURTHER RESOLVED, that the Treasurer of the United States Shipping

> Board Merchant Fleet Corporation be and he is hereby authorized and required to address to each one of the said banks and banking institutions now having such monies on deposit, a letter in the form hereto attached enclosing a form of deposit agreement, and as a condition for the continuance of said deposit the said Treasurer of the said Merchant Fleet Corporation is authorized and directed to require the signing of an agreement in the form attached hereto, and the deposit by such depositary of United States Bonds in adequate amounts as collateral for the repayment of the amount of each deposit in each bank and banking institution, respectively.

It thus appears to be admitted by resolution of the Board that all moneys deposited in banks in the name of the United States Shipping Board Merchant Fleet Corporation are moneys of the United States, which is in accord with letter of June 16, 1931, A–7515.

Section 14 of the Merchant Marine Act, 1920, 41 Stat. 988, provides:

> That the net proceeds derived by the board prior to July 1, 1921, from any activities authorized by this Act, or by the "Shipping Act, 1916," or by the Acts specified in section 2 of this Act, except such an amount as the board shall deem necessary to withhold as operating capital, for the purposes of section 12 hereof, and for the insurance fund authorized in section 10 hereof, and for the construction loan fund authorized in section 11 hereof, shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the con-

> struction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts. The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by section 2 of this Act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts.

The provision as to receipts subsequent to July 1, 1921, "less such amount as may be authorized annually by Congress to be withheld as operating capital," is not considered as granting authority to deposit such moneys in banks, but merely for the withholding of certain funds from deposit into the Treasury of the United States as "miscellaneous receipts."

The following provisions of law are pertinent in connection with the points raised in your letter:

> The gross amount of all moneys received from whatever source to the use of the United States, except as otherwise provided, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department" (Section 3617, Revised Statutes).

The Secretary of the Treasury may designate such depositaries of public moneys in foreign countries and in the territories and insular possessions of the United States as may be necessary for the transaction of the Government's business, under such terms and conditions as to security and otherwise as he may from time to time prescribe: Provided, That in designating such depositaries American financial institutions shall be given preference wherever, in the judgment of the Secretary of the Treasury, such institution is safe and able to render the service required" (42 Stat. 692).

All collectors and receivers of public money of every description, within the District of Columbia, shall, as often as they may be directed by the Secretary of the Treasury or the Postmaster General so to do, pay over to the Treasurer of the United States, at the Treasury, all public moneys collected by them or in their hands * * *. It shall be the duty of the Secretary and Postmaster General, respectively, to direct such payments by the collectors and receivers * * * at least as often as once in each week, and as much oftener as they may think proper (Section 3615, Revised Statutes).

Every person who shall have moneys of the United States in his hands or possession, and disbursing officers having moneys in their possession not required for current expenditure, shall pay the same to the Treasurer, or some public depositary of the United States, without delay, and in all cases within thirty days of their receipt. And the Treasurer or the public depositary shall issue duplicate receipts for the moneys so paid, transmitting forthwith the original to the Secretary of the Treasury, and delivering

the duplicate to the depositor: Provided, That postal revenues and debts due to the Post Office Department shall be paid into the Treasury in the manner required by law. (Section 3621, Revised Statutes; 29 Stat. 179; 41 Stat. 654–655.)

Title 12, section 90, of the Compiled Statutes, referred to in the resolution, *supra,* has reference to the powers of the Secretary of the Treasury in the designation of national banking institutions as public depositaries, and does not confer on any other branch or establishment of the Government any powers as to designation and amount or class of security to be required of depositaries.

The court decisions cited in your letter, *Sloan Shipyards* v. *U. S. S. B. E. F. C.,* 258 U. S. 549, *Skinner & Eddy* v. *McCarl,* 275 U. S. 1, and *U. S. S. B. M. F. C.* v. *Leroy Harwood, Trustee,* 281 U. S. 519, hold in substance that the Merchant Fleet Corporation is a separate entity, bound by and subject to suit in connection with its corporate acts.

The provisions contained in the current and certain prior appropriation acts covering the availability of interest earned on funds of the Merchant Fleet Corporation and its accrual to these funds is not construed as authorizing such funds to be kept in the possession of the corporation and invested or deposited in banks not officially designated depositaries of the United States, in violation of the specific acts above quoted. Such provisions appropriate the interest which has accrued on bank deposits already made under the irregular practice, for the purposes mentioned in said appropriation acts, and may not be said to sanction or authorize the continuance of such practice.

The resolution adopted by the Board on December 9, 1931, approves a certain deposit agreement between the Merchant Fleet Corporation and the Commercial National Bank, Washington, D. C., accepting as security for the deposit balance notes secured by deeds of trust on real property in the District of Columbia. Inasmuch as it is admitted that the funds in the hands of the Merchant Fleet Corporation are public moneys, it is held that the general statutes applicable to the safeguarding of such public moneys are applicable in the absence of specific legislation to the contrary. Expenses of the Fleet Corporation are now being paid by Treasury checks in Washington, and there appears no necessity for maintenance of the account with the Commercial National Bank.

Whether or not compliance with statutory law will increase or diminish the burdens of a department or establishment of the Government is a matter for submission to the Congress for its consideration.

It is therefore requested that the matter be given further consideration and this office advised as to the action taken.

Respectfully,

(Signed) J. R. McCarl,
Comptroller General of the United States.

PART D.—REPORTS

Annual Report of the Isthmian Canal Commission for 1913, p. 415:

> The major portion of the funds of the Canal Zone have been continued on deposit with the two depositories at Washington,

D. C., although an amount not exceeding $100,000 is deposited in one of the banks on the Isthmus. The actual amount in all depositories on June 30, 1913, was $2,168,339.62, secured by the deposit of high-grade bonds under control of a representative of the Government.

Annual Report of the Isthmian Canal Commission and the Panama Canal for 1914, p. 328:

> The major portion of the funds of the Canal Zone have continued on deposit with the two depositories in Washington, although an amount not exceeding $100,000 is deposited in one of the banks on the Isthmus. The amount on deposit in all depositories June 30, 1914, was $1,594,285.53, against $2,168,339.62 on June 30, 1913. These funds are secured by the deposit of high grade bonds under the control of a representative of the Government.

Annual Report of the Governor of the Panama Canal for 1915, pp. 278, 279:

> The depositaries of Canal Zone funds, including in that term money order, postal savings, and clubhouse funds, have been continued three in number, the District National Bank and the Commercial National Bank, of Washington, D. C., and the Panama Branch of the International Banking Corporation. On June 30, 1913, the amount on deposit was $2,168,339.62; on June 30, 1914, $1,594,285.53; and on June 30, 1915, $770,965.18. There is also a small amount still remaining in the Riggs National Bank of Washington, necessarily left there on account of outstanding checks chargeable against the deposit. These funds are all secured by the deposit of high-grade bonds

under the control of a representative of the Government. Interest on deposits during the year amounted to $48,798.35, as against $61,354.12 received during 1914.

Report of the Governor of the Panama Canal for 1916, pp. 485, 486:

Attention is invited to the statement of postal receipts and expenditures which is appended to this report. It will be noted that the receipts for 1916 were $1,060.90 more than in the previous year. The expenses were $9,739.19 less. The deficit was $44,527.14, as compared with $55,327.23 in 1915. In any consideration of the postal deficit it should be remembered that the postal service is still burdened with a subsidy to the Panama Government equivalent to 40 percent of its total stamp sales—in 1916, $27,207.86—and that the service is allowed no credit in the accounts for the interest earned by money-order and postal-savings funds on deposit with banks, amounting in 1916, according to an estimate furnished by the auditor, to about $39,000. If the subsidy were withdrawn and the credit were allowed for interest earned by these funds, the account would show a surplus of approximately $20,000.

* * * * *

As previously stated in this report, a large part of the deficit of the Canal Zone postal system would be wiped out if the postal division were allowed interest received from Canal Zone money-order funds deposited in banks under Canal Zone regulations. In the past these earnings have been deposited with the United States Treasurer. If this interest were credited to the postal division, it would also permit the payment of interest

upon deposit money orders. The following sections were therefore made a part of a bill which passed the House of Representatives on June 17, 1916 (H. R. 15955):

* * * * *

It is hoped that this legislation will be enacted.

PART E.—HOUSE REPORT NO. 1083, 67TH CONG., 2D SESS., PP. 15–17

AMENDMENT TO SECTION 6 OF THE ACT OF AUGUST 21, 1916

Early in January, 1921, hearings were held by the committee on a bill then pending to amend section 6 of the act entitled "An act extending certain privileges of canal employees to other officials on the Canal Zone and authorizing the President to make rules and regulations affecting health, sanitation, quarantine, taxation, public roads, self-propelled vehicles, and police powers on the Canal Zone, and for other purposes," including provision as to certain fees, money orders, and interest deposits, approved August 21, 1916, and on January 10 Col. Chester Harding, then Governor of the Panama Canal, testified at the hearings. Governor Harding strongly recommended this legislation. At the hearings he filed and made a part of his testimony the following letter from the then Secretary of War, which states some of the most forceful arguments in favor of this legislation:

WAR DEPARTMENT,
Washington, September 12, 1919.

THE SPEAKER OF THE HOUSE OF REPRESENTATIVES.

SIR: I have the honor to state that a communication has been received from Col. Chester Harding, governor of the Panama Canal, from which the following is quoted:

The rate of interest which can be paid on deposit money orders in the Canal Zone postal service is limited by the act of Congress approved August 21, 1916, section 6 of which act reads as follows:

"Deposit money orders issued in the Canal Zone in lieu of postal savings certificates, in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding 2 per centum per annum."

Since the establishment of the deposit money-order system in the Canal Zone deposits have been made to the amount of $4,793,125 during the fiscal years ending 1916, 1917, 1918, and to date in 1919. The employees of the Panama Canal during the same period have bought $4,716,100 worth of Liberty loan bonds and war savings stamps. The residents of the Canal Zone have learned to save and have acquired the saving habit to a high degree during the foregoing period, and I believe that inducement and opportunity should be offered them to continue saving.

The Treasury Department has refused to continue the sale of war savings stamps in the Canal Zone, and it is not likely that there will be further Government loans; therefore it appears that the deposit money-order system of savings will have to be substituted for the foregoing method. In order to make this more attractive, it is considered that the rate of interest should be increased. * * *

Gov. Harding then recommends that the rate of interest paid on deposit money orders in the Canal Zone postal service be increased from 2 per cent to 3 per cent, and I concur in this recommendation.

In order to accomplish the foregoing, it is requested that section 6 of the act of Congress approved August 21, 1916, be amended by the substitution of the word "three" per cent in place of the word "two" per cent, which section would then read as follows:

> SEC. 6. That deposit money orders issued in the Canal Zone in lieu of postal savings certificates, in accordance with the rules and regulations heretofore established by the President, or that may hereafter be established by him, shall bear interest at a rate not exceeding three per cent per annum.

It should be stated that the postal money-order funds of the Canal Zone are deposited in banks in the United States, upon which interest is paid, and which funds are secured by the deposit of certain standard bonds. The interest thus received will more than pay the proposed rate of 3 per cent on deposit money orders, and therefore there will be no loss to the United States Government if the rate is increased as requested, this being due to the fact that under the regulations which have been established no interest is paid on deposit money orders unless the money remains on deposit for more than three months, and then only in three-month periods.

It is believed that the rate of interest in the Canal Zone should be increased in order to encourage thrift among the employees of the Panama Canal, a large percentage of whom are aliens. The principal banks in Panama pay 4 per cent on savings or time accounts, the rate generally allowed on checking accounts being only 2 per cent, and the loan rates on the Isthmus are generally 9 per cent.

The canal employees as a rule prefer to place their savings with the United States Government rather than in private banks, and therefore use the post offices as depositaries. Considerable adverse comment has been made by them in regard to the low rate of 2 per cent interest allowed on deposit money orders under the present law, in view of the much higher rates allowed by the banks in Panama. Under the circumstances it is believed that the canal employees should be encouraged in every possible way to save and to deposit their savings with the Government, and it is thought that the increasing of the rate of interest on deposit money orders from 2 to 3 per cent will be of great assistance toward accomplishing this end.

Very respectfully,

NEWTON D. BAKER,
Secretary of War.

It is the view of the committee that thrift and savings ought to be encouraged as much as possible among the employees on the Canal Zone. There are, of course, no banks on the Canal Zone. It has been thought undesirable for the employees to be forced to deposit their savings in banks in the Republic of Panama, where there have been several serious bank failures. It is not always convenient for the employees to send their savings back to the States for deposit in the banks there. The act of August 21, 1916, provided for the issue of deposit money orders in lieu of postal savings certificates by the post offices in the different towns there, to bear 2 per cent interest. The funds received on

deposit from these sources are deposited by the canal government in banks in the States, and the government receives from 3 to 3½ per cent interest thereon. It is thought that the rate of interest paid by the government to the employees on their savings deposits ought to be increased to 3 per cent, and that is the purpose of this bill.

WAR DEPARTMENT,
Washington, January 17, 1922.

Hon. SAMUEL E. WINSLOW,
Chairman Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D. C.

MY DEAR CONGRESSMAN: Referring to your letter of January 13, 1922, addressed to the Washington office of the Panama Canal, asking for a report on bill H. R. 9051 amending section 6 of the act approved August 21, 1916, I inclose herewith a copy of House Document No. 248, Sixty-sixth Congress, first session, which contains a letter dated September 12, 1919, from the Secretary of War to the Speaker of the House of Representatives, requesting that the act of August 21, 1916, be amended to permit the payment of 3 per cent instead of 2 per cent interest on deposit money orders in the Canal Zone, which letter was referred to your committee. A bill (H. R. 14739) was subsequently introduced by Mr. Esch, on December 8, 1920, to amend the act as requested, and on January 10, 1921, Gen. Chester Harding, then Governor of the Panama Canal, appeared before your committee in regard to the bill. Gen. Harding's

testimony will be found on pages 10 to 13 of the inclosed copy of hearings before your committee. The bill was favorably reported on January 11, 1921, but no further action was taken thereon by the Sixty-sixth Congress.

The present bill (H. R. 9051) is identical with the previous bill (H. R. 14739), with the exception that the word "taxes" in the fourth line of the title and the sixth line of the bill proper should be "taxation," and the word "process" in the sixth line of the title and the eighth line of the bill proper should be "provision."

I am advised that there has been no change in the situation and that the Panama Canal authorities still desire that this legislation be enacted, and I therefore recommend that your committee submit a favorable report on the bill, and that everything possible be done to secure its early passage in the House of Representatives.

Sincerely yours,

JOHN W. WEEKS,
Secretary of War.

PART F.—CORRESPONDENCE

WHITE HOUSE,
Washington, D. C., May 9, 1904.

SIR:

* * * * *

Inasmuch as it is impracticable for the President, with his other public duties, to give to the work of supervising the Commission's construction of the Canal and government of the zone the personal attention which seems proper and necessary, and inasmuch as the War Department is the de-

partment which has always supervised the construction of the great civil works for improving the rivers and harbors of the country and the extended military works of public defense, and as the said department has from time to time been charged with the supervision of the government of all the island possessions of the United States, and continues to supervise the government of the Philippine Islands, I direct that all the work of the Commission done by virtue of powers vested in me by the act of Congress approved June 28, 1902, in the digging, construction, and completion of the Canal, and all the governmental power in and over said canal zone and its appurtenant territory, which by virtue of the act of Congress approved April 28, 1904, and these instructions, shall be vested in said Isthmian Canal Commission, shall be carried on or exercised under your supervision and direction as Secretary of War.

Subject to the limitations of law and the conditions herein contained, the Isthmian Canal Commission are authorized and directed:

1. To make all needful rules and regulations for the government of the zone and for the correct administration of the military, civil, and judicial affairs of its possessions until the close of the Fifty-eighth Congress.

2. To establish a civil service for the government of the strip and construction of the Canal, appointments to which shall be secured as nearly as practicable by a merit system.

* * * * *

6. To make all needful rules and regulations respecting an economical and correct disbursement

and an accounting for all funds that may be appropriated by Congress for the construction of the canal, its auxiliary works, and the government of the canal zone; and also to establish a proper and comprehensive system of bookkeeping, showing the state of the work, the expenditures by classes, and the amounts still available.

* * * * *

The commission may legislate on all rightful subjects of legislation not inconsistent with the laws and treaties of the United States so far as they apply to said zone and other places, and the said power shall include the enactment of the sanitary ordinances of a preventive or curative character to be enforced in the cities of Colon and Panama and which are contemplated and authorized by Article 7 of said Canal Convention. Such legislative power shall also include the power to raise and appropriate revenues in said zone; and all taxes, judicial fines, customs duties, and other revenues levied and collected in said zone by or under the authority of said commission shall be retained, accounted for, and disbursed by said commission for its proper purposes. The members of said commission to the number of four or more shall constitute a legislative quorum, and all rules and regulations passed and enacted by said commission shall have set forth as a caption that they are enacted by the Isthmian Canal Commission "By authority of the President of the United States."

* * * * *

All laws, rules, and regulations of a governmental character enacted by the commission hereunder shall be submitted to you for your approval,

and should your approval be withheld from any such law, rule, or regulation, then from that time the law, rule, or regulation shall thereafter have no force or effect.

* * * * *

The necessary expenses incurred by the commission in carrying on the government of the canal zone will be defrayed from the local revenues so far as the said revenues may be sufficient and the remainder will be met from the appropriation made by the fifth section of the act of Congress approved June 28, 1902. An estimate of the proposed expenditures and revenues for each year in carrying on the government of the zone will be submitted to Congress at the beginning of each annual session.

* * * * *

These instructions may be modified and supplemented as occasion shall arise.

Very respectfully,

THEODORE ROOSEVELT.

Hon. WILLIAM H. TAFT,
Secretary of War.

ISTHMIAN CANAL COMMISSION,
DEPARTMENT OF
EXAMINATION OF ACCOUNTS,
Empire, Canal Zone, September 19, 1908.

Lieut. Col. GEO. W. GOETHALS,
Chairman and Chief Engineer, Culebra, C. Z.

SIR: The appointment of a Treasurer of the Canal Zone and his entrance upon duty October 1, 1908, brings up the question of the safekeeping of

the money of the Canal Zone Government now amounting to more than one million dollars. Since the beginning of the work in 1904 the Disbursing Officer of the Commission has acted as Treasurer of the Canal Zone and for some time past has kept the moneys of the United States and of the Canal Zone in one fund. In order to avoid keeping a total of more than two million dollars in cash in the office building at Empire, the present Disbursing Officer has used the Canal Zone moneys, as occasion required, in payment of the obligations of the Commission. At the present time he has not a sufficient amount of cash on hand to pay over the money due the Canal Zone and at the same time meet the Commission's obligations. He has, however, a large balance to his credit as Disbursing Officer, with the Assistant Treasurer of the United States at New York. From this balance he can have shipped a sufficient amount of cash to pay over to the new Treasurer of the Canal Zone, the entire amount due, if it is found desirable to do so.

It being important that the moneys of the Canal Zone should be kept separate, such moneys now received by the Treasurer exceeding five million dollars a year, you determined that a Treasurer should be appointed. Mr. Homer A. A. Smith has executed the required bond and will enter upon the duties of the office October 1, 1908.

More than ninety percent of the moneys received by the Canal Zone Government are money-order funds. At this time money-order sales are made at the rate of five million dollars a year. Many employees on the Isthmus purchase money orders payable to themselves at the place of issue and hold

them for many months; others purchase them payable to themselves at post offices in the United States. Under its arrangement with the United States Post Office Department the Canal Zone Government pays at the time of issue ninety percent of the face value of orders drawn on the United States. Thus ten percent of the amount of these orders is held until they have been paid by the United States Postal Service. This fund with the balance of the ninety percent always on hand pending the arrival of the time for regular remittance, constitutes a large fund. There is also a fund of about four hundred thousand dollars which represents the value of money orders issued in the Zone and payable in the Zone. This may be said to be the savings of employees who deposit them for safe-keeping.

The experience of the past year has shown that there is not less than seven hundred thousand dollars that is in the nature of a permanent fund, which will remain in the Treasury of the Canal Zone Government, in cash and will not be touched. I think it undesirable to keep this amount in the office building at Empire, if other arrangements can be made. In my opinion it is desirable that the Treasurer have a depository on the Isthmus for the purpose of issuing checks in payment of accounts when it is found best to pay particular classes of accounts by check.

As the moneys of the Zone are not moneys of the United States, the laws regarding the designation of depositories of public moneys do not apply. The International Banking Corporation is not incorporated under the national banking law of the

nited States, but it has been used as a fiscal gency in connection with the financial transactions f the War Department in the Insular possessions f the United States. This corporation has anches in the Canal Zone, and for that reason I ave the honor to suggest that the Honorable Sec- tary of War be requested to authorize the making f an agreement with the International Banking orporation for the deposit with it of approxi- ately seven hundred thousand dollars. I would so suggest, for your consideration, that as the Var Department has had dealings with this bank nd the main office of the bank is in New York City, may be best that the negotiations be had between he War Department and the bank, rather than etween the Commission on the Isthmus and the ank.

Without knowing anything of the attitude of he bank on the subject I beg to suggest the fol- wing brief outline of what I think is desirable om the standpoint of the Canal Zone:

1. The Canal Zone will place on deposit with the ank at New York, or with its branches on the sthmus for the credit of the New York bank, as he bank may prefer, six hundred thousand dollars more, subject to the check of the Treasurer of he Canal Zone. To this account the Treasurer ould deposit checks on New York received by him om the Disbursing Officer of the Isthmian Canal ommission in exchange for cash and other checks nd drafts payable in the United States. The Dis- ursing Officer pays out about one and one-half illion dollars monthly in salaries and wages, and considerable amount comes back to the Treasurer

of the Canal Zone through the post offices. The Treasurer would draw on this account in New York as a rule only to make payments to the Postal Service of the United States. So far as can be foreseen, the balance of this account would for several years never be less than six hundred thousand dollars.

2. The bank should pay interest, at a rate agreed upon, on the average daily balance on deposit in New York, and, if desired by the bank, it would be practicable to give notice of say thirty days, if it be found necessary at some future time to so draw on the account as to reduce the balance below six hundred thousand dollars. The bank should render a monthly statement of deposits and payments, and credits to the Treasurer on Interest Account.

3. The Canal Zone will place on deposit with the bank on the Isthmus one hundred thousand dollars or more, subject to the check of the Treasurer of the Canal Zone, and checks to be payable at any of the branches of the bank on the Isthmus. It is intended that this fund on deposit shall include all moneys not deposited in or to the credit of the bank in New York and not needed by the Treasurer for current cash payments. This fund on deposit on the Isthmus should not bear interest but will not be less than one hundred thousand dollars at any time and would approximate two hundred thousand dollars at the present time.

4. The agreement should be for one year and be renewed from year to year with the option on the part of either the bank or Secretary of War to terminate the agreement on three months' notice; the agreement to be immediately terminated should

Congress, by law, direct its termination, or give directions concerning Canal Zone funds inconsistent with it.

5. The bank should furnish security to the satisfaction of the Secretary of War, either in the form of a deposit of bonds or other marketable securities payable to the Treasurer of the Canal Zone, or by the guaranty of three or more surety companies to the satisfaction of the Secretary of War.

Respectfully,

W. W. WARWICK,
Examiner of Accounts.

ISTHMIAN CANAL COMMISSION,
PURCHASING DEPARTMENT,
Washington, D. C., October 21st, 1908.

Honorable LUKE E. WRIGHT,
Secretary of War, Washington, D. C.

SIR: I have the honor to forward herewith a letter from Mr. W. W. Warwick, the Examiner of Accounts, relative to the deposit of Canal Zone funds, which have been separated from the monies covered by Congressional appropriations, and are now in the custody of the Treasury of the Canal Zone.

As noted in Mr. Warwick's letter, the monies of the Zone are not monies of the United States, so that the laws regarding the designation of depositories of public monies do not apply. It is advisable, however, that the funds should not remain in the hands of the Treasurer and also desirable that so much of the monies as are not in constant use should, if possible, draw interest. It would

be a matter of great convenience if the company to be made depository have a branch on the Isthmus, thereby eliminating all questions of exchange.

There are on the Isthmus four banks; a branch of the International Banking Company; Isaac Brandon and Brothers, Merchants and Bankers; Ehrman Brothers; and the Panama Banking Company. I forward herewith propositions for the care of these funds from both the International Banking Company and Isaac Brandon and Brothers. It is to be noted that the latter firm is just reorganizing, while the former is a long and well-established banking house. The Examiner of Accounts recommends that the International Banking Company be selected as the depository for the Canal Zone funds and if not inconsistent with public policies, I have the honor to recommend favorable consideration, the arrangements to be entered into with the International Banking Company being similar to those now existing between the War Department and this Company covering the deposit of Philippine funds.

Respectfuly,

GEO. W. GOETHALS,
Chairman and Chief Engineer.

Enclosures 3.

ISTHMIAN CANAL COMMISSION,
PURCHASING DEPARTMENT,
Washington, D. C., October 24, 1908.

The Honorable, LUKE E. WRIGHT,
Secretary of War, Washington, D. C.

SIR: I have the honor to forward herewith a letter from the International Banking Corporation,

dated October 23d, withdrawing their letter of the 17th instant relative to Canal Zone funds.

This leaves for consideration Isaac Brandon and Brothers, Bankers, and the Commercial National Bank of Washington, D. C., the President of which offered to pay 3½% interest on any amounts left for one year in their charge, and in view of the fact that the former is not yet organized and that the security proposed is not as good as that offered by the Commercial National Bank, I recommend that the Commercial National Bank of Washington, D. C., be made the depository for the Canal Zone funds that can be deposited in the United States and that similar arrangements be made with this Company relative to security as now exist between the Insular Bureau and the International Banking Corporation for the funds of the Philippine Islands.

If this meets with your approval, I would recommend that Captain F. C. Boggs, General Purchasing Officer, represent the Canal Zone Government in all matters relating to these funds.

Respectfully,

GEO. W. GOETHALS,
Chairman and Chief Engineer.

[1st Indorsement]

WAR DEPARTMENT,
October 24, 1908.

Approved as recommended by the Chairman and Chief Engineer.

LUKE E. WRIGHT,
Secretary of War.

APRIL 20, 1910.

Mr. CHAS. D. NORTON,
Assistant Secretary of the Treasury,
Washington, D. C.

SIR: Referring to our conversation this afternoon, and at your request, I respectfully submit the following questions in regard to the deposit of Canal Zone funds.

As a preliminary, it might be stated that the total funds amount to approximately $1,500,000.00, of which $1,250,000.00 is approximately permanent, the average fluctuating amount being about $250,000.00.

1. What bonds would you consider as satisfactory to secure this deposit?

2. Do you approve the bonds stated as being satisfactory under the Treasury Department Circular of December 24, 1908?

3. Do you consider White & Kemble's Digest as satisfactory to decide whether these bonds are approved legal securities in the States mentioned?

4. Do you think, in view of the fact that the contract provides for checking out at any time, that the total amount of the securities calculated on their market value should be the same as the amount deposited; or do you consider that the bonds should be accepted at only 90% of their market value?

5. Would you deem it satisfactory to accept indemnity bond for any portion of this deposit, keeping in mind that the deposit is public money?

6. If the deposit is thoroughly protected by satisfactory bonds, would you deem it advisable, as a

matter of safety, to divide the total fund of $1,500,000.00 between two or more banks?

7. Would you deem it advisable to place the bonds given as security for the deposit in the vault of the bank with whom the contract is made; or, would you consider it better to place them with a third party, the vault to be opened only in the presence of a representative of all three parties, except where, under the provisions of the contract, the Secretary of War directs that the bonds be withdrawn for sale?

8. Do you consider an immediate termination of the contract by either party as advisable; or do you think a certain length of time, such as ten days, should be given in order that the bank could secure the sum without injury to its other depositors?

Very respectfully,

(Signed) F. C. Boggs,
Captain, Corps of Engineers, U. S. A.,
Chief of Office.

Treasury Department,
Office of the Secretary,
Washington, April 21, 1910.

Captain F. C. Boggs,
Corps of Engineers, U. S. A.,
Isthmian Canal Commission,
Washington, D. C.

Sir: In reply to your letter of the 20th instant in the matter of security for Canal Zone funds on deposit with national bank depositaries I would say in answer to inquiries:

Nos. 1 and 2. The kinds of bonds named in the press announcement of the Secretary of the Treas-

ury dated December 18, 1909, copy enclosed, would be satisfactory security on the bases named in said announcement.

No. 3. White and Kemble's Digest is regarded as reliable.

No. 4. See answer to Nos. 1 and 2.

No. 5. An indemnity bond would not be satisfactory.

No. 6. It would be advisable to divide the deposits between two or more banks.

No. 7. The security should be kept in your own safe.

No. 8. This Department usually gives notice of two weeks or more of the withdrawal of deposits according to the amount withdrawn.

There appears to be no objection to the propositions contained in your letter of the 21st instant.

Respectfully,

C. D. HILLES, *Acting Secretary.*

WAR DEPARTMENT,
Washington, April 23, 1910.

The Honorable, the SECRETARY OF THE TREASURY,
Washington, D. C.

SIR: Referring to our recent conversation at Cabinet Meeting in connection with the Canal Zone funds:

Will you kindly advise me whether you would consider a deposit with either the Commercial National Bank, of Washington, D. C., or Riggs National Bank, at about two per cent., satisfactory, if the deposit were covered by bonds described in

paragraphs 2 and 3 of Treasury Department Circular dated December 24, 1908. Copy of this circular is enclosed herewith.

Very respectfully,

J. M. DICKINSON,
Secretary of War.

1 inclosure.

TREASURY DEPARTMENT,
Washington, April 25, 1910.

MY DEAR MR. SECRETARY: I am sorry I did not receive your letter of April 23 on Saturday in time to send you a reply as you requested. I was in Baltimore Saturday afternoon and did not return until late.

My judgment is that a deposit in the Commercial National Bank of Washington, or the Riggs National Bank, at about two percent would be safe and satisfactory if the deposit were covered by bonds described in Treasury Circular dated December 24, 1908.

Very sincerely yours,

FRANKLIN MACVEAGH.

Hon. J. M. DICKINSON,
Secretary of War.

THE SECRETARY OF THE TREASURY,
Washington, July 28, 1914.

DEAR MR. SECRETARY: Replying to your recent request, I take pleasure in handing you herewith a letter from the Comptroller of the Currency, in which he recommends the three following institu-

tions, or either one or more of them, as suitable depositaries for Panama Canal funds:

Commercial National Bank;
District National Bank;
Continental Trust Company,

all of this city. As the Commercial National Bank is already one of your depositaries, you may find it convenient to extend your balance with that bank, and to open additional accounts with the District National Bank and the Continental Trust Company. Upon notice from you, each one of these banks will comply with the regulations of the War Department as to deposit of securities, etc.

Will you kindly advise me when you have taken action in this matter?

Very sincerely yours,

W. G. McADOO.

Hon. L. M. GARRISON,
Secretary of War.

Enclosure.

U. S. GOVERNMENT PRINTING OFFICE: 1938